4-343

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 211.

THE FIRST NATIONAL BANK OF WASHINGTON, PLAINTIFF IN ERROR,

vs.

A. F. WHITMAN, ADMINISTRATOR DE BONIS NON OF SAMUEL KIMBRO, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED OCTOBER 24, 1874.

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1 In the supreme court of the District of Columbia, the 21 day of October, 1874.

WHITMAN, ADMR. DE BONIS NON OF SAMUEL Kimbro,
vs.
FIRST NATIONAL BANK OF WASHINGTON.
} At law, No. 9069. In error.

Know all men by these presents that we, Edwin L. Stanton and Francis Miller, are bound unto the above-named Whitman, adr. de bonis non of Samuel Kimbro, in the sum of two hundred and fifty dollars, to be paid to the said Whitman, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents, sealed with our seals and dated this 21st day of October, 1874.

Whereas the above-named First National Bank of Washington hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is, that if the above-named First National Bank of Washington shall prosecute *his* said writ of error to effect, and answer all damages and costs if *he* shall fail to make good *his* plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

EDWIN L. STANTON. [SEAL.]
FRANCIS MILLER. [SEAL.]

Sealed and delivered in presence of—
ALBERT HARPER as to Edwin L. Stanton.
Approved.

D. K. CARTTER,
Chief Justice.

(Endorsed:) Filed Oct. 23, 1874. R. J. Meigs, clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court before you, between A. F. Whitman, administrator de bonis non of Samuel Kimbro, deceased, plaintiff, and the First National Bank of Washington, D. C., defendant, at law, No. 9069, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears; and it being fit that the error, if any hath happened, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; therefore, you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be

done therein to correct the error what of right and according to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this 23rd day of October, in the year of our Lord 1874, and of the Independence of the United States the 99th.

[SEAL.] R. J. MEIGS, *Clerk*,
By JOB BARNARD,
Asst. Clerk.

DISTRICT OF COLUMBIA, *to wit:*

To A. F. Whitman, admr. de bonis non of Samuel Kimbro, decd.

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein The First National Bank of Washington, D. C., is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness, D. K. Cartter, chief justice of the supreme court of the District of Columbia.

I hereby acknowledge service of the above citation this 23rd day of October, 1874.

J. DANIELS,
Attorney for deft. in error.

3 The answer of the chief justice and the justices of the supreme court of the District of Columbia to the foregoing writ of error is in the words following, to wit:

Declaration.

In the supreme court of the District of Columbia, the day of , 1871.

ELIZABETH V. KIMBRO, ADMINISTRATRIX OF Samuel Kimbro, deceased, pltff.,
vs.
THE FIRST NATIONAL BANK OF WASHINGTON, D. C., deft. } At law, No. 9069.

The plaintiff sues the defendant:

1st. For money lent by the plaintiff to the defendant.

4 2d. For money paid by the plaintiff for the defendant at his request.

3d. For money received by the defendant for the use of the plaintiff.

And the plaintiff claims three thousand four hundred and fourteen dollars, with interest from the 9th day of March, 1867, besides costs.

J. DANIELS,
Pltff.'s Atty.

The defendant is to plead hereto on or before the first special term of the court occurring twenty days after service hereof; otherwise judgment.

J. DANIELS,
Pltff.'s Atty.

(Endorsed:) 9069.
The clerk will please file & issue the writ.

J. DANIELS,
Pltff.'s Atty.

Filed 29 Nov., 1871.

5 *Affidavit filed with declaration.*

STATE OF TENNESSEE, *County of Davidson, ss*:

Elizabeth V. Kimbro, of said county, being duly sworn, deposes and says that she is the plaintiff in the above entitled, and is the widow of the late Samuel Kimbro, of said county, who died on the 30th day of September, A. D. 1871. That she was duly and legally appointed administratrix of the estate of the said Samuel Kimbro on the 24th day of November, 1871, as will appear from the letters of administration, copies of which are hereto annexed, and made part of this affidavit.

That during the life-time of her said husband, Samuel Kimbro, and while they were living together as husband and wife, and on or
6 about the 9th day of March, A. D. 1867, the Treasurer of the United States issued to her, this deponent, by the name of E. S. Kimbro, Treasury draft No. 9243, for the sum of three thousand four hundred and fourteen dollars, said draft being drawn on the First National Bank of the City of Washington, D. C. That afterwards, and on or about the day of , 1867, the said bank paid the said draft to some person unknown to this plaintiff or her late husband, & without the authority and without the knowledge or consent of said plaintiff, and without the knowledge or consent of her said husband, and that the said Treasurer of the United States did, on or about the day of , 1867, credit the defendant with the amount so paid on said draft. Deponent further says she never did endorse her name on said draft, nor did her said husband, nor did she or her
7 said husband authorize any one to endorse her name upon said draft. That she did not, neither did her said husband, at any time part with said draft or any interest therein; and that she did not, neither did her said husband, have any knowledge that said draft had been paid by said defendant until on or about the 1st day of February, 1869. That as soon as she was aware of said payment she took steps to recover the amount of said draft from said defendant, by bringing her action against said defendant in this honorable court, which action was commenced on the day of , 1869. Said action was brought in her own name, as the draft was made payable to her; that said action was prosecuted in this court, and on trial of said cause the jury returned a verdict for this plaintiff for the sum of three thousand
8 four hundred & fourteen dollars, and interest from the ninth (9th) of March, 1867; that the defendant moved for a new trial, which motion was overruled by the court, from which ruling the defendant appealed to the supreme court in banc; that upon the hearing of the case in said supreme court it was decided that said suit could not be maintained in the name of this plaintiff, as she was a married woman, for that the property or draft which was the subject of the action vested in her husband, and therefore remanded the case to the court below to be proceeded in according to law; all of which will more fully and at large appear by reference to the records of this court and the said supreme court, to which reference is made as part of this affidavit.

That at the time of the decision last above named her late husband was in feeble health, and continued to remain in such condition
9 until his death, which occurred on the 30th day of September, 1871, as above stated. That she now brings this suit as the administratrix of the estate of her said husband, and that there is now due and owing to this plaintiff from said defendant on account of said draft the full sum of three thousand four hundred and fourteen dollars and in

terest thereon from the 9th day of March, 1867, exclusive of all set-offs and just grounds of defence, beside costs.

ELIZABETH V. KIMBRO.

STATE OF TENNESSEE,
Davidson County, ss:

Sworn to and subscribed before me, W. G. Ewin, clerk of the county court, a court of record in and for the county & State before written, by Mrs. Elizabeth V. Kimbro, to me well known as the party she represents herself to be, this 24 day of November, A. D. 1871, at office, in Nashville, Tenn. Witness my hand, &c.

10 [SEAL.]

C. H. EASTMAN,
Dept. Clerk, Davidson Co. Court.

Copy letters administration.

STATE OF TENNESSEE,
Davidson County, ss:

To Elizabeth V. Kimbro, a citizen of Davidson County:

Whereas it appears to the court now in session that Samuel Kimbro has died, leaving no will, and the court being satisfied as to your claim to the administration, and you having given bond and qualified as directed by law, and the court having ordered that letters of administration be issued to you:

These are, therefore, to authorize and empower you, the said Elizabeth V. Kimbro, to take into your possession and control all the goods, chattels, claims, and papers of the said intestate, and return a true and perfect inventory thereof to our next county court, or within
11 ninety days from the date hereof, to collect and pay all debts, and to do and transact all the duties in relation to said estate, which lawfully devolve on you as administrator; and, after having settled up said estate, to deliver the residue thereof to those who have a right thereto by law. Herein fail not.

Witness W. G. Ewin, clerk of said court, at office, this 24th day of Nov'r, 1871, and 96th year of American Independence.

[SEAL.]

W. G. EWIN, *Clerk*,
By C. H. EASTMAN, *D. C.*

[$1.50 U. S. rev.]

STATE OF TENNESSEE,
Davidson County, ss:

I, W. G. Ewin, clerk of the county court of said county, do hereby certify that the within is a full, true, and perfect copy of the letters of administration granted Mrs. Elizabeth V. Kimbro upon the estate of Samuel Kimbro, dec'd, as the same appears of record and now on file in my office.

12 Witness my hand & seal of said court at office in Nashville, this Nov'r 24th, 1871.

[SEAL.]

C. H. EASTMAN,
Dep. Clerk, Davidson County Court.

(Endorsed:) 9069. Elizabeth V. Kimbro, admx., estate Sam'l Kimbro, vs. 1st National Bank of Washington, D. C. Plaintiff's afft. Filed 29 November, 1871.

Pleas and affidavit.

In the supreme court of the District of Columbia, the day of December, 1871.

E. V. KIMBRO, EXX. OF KIMBRO,
vs.
THE FIRST NATIONAL BANK OF WASHINGTON. } At law, No. Pleas.

The defendant says:

1. That it never was indebted as alleged.
2. That the alleged cause of action did not accrue within three years before this suit.

13 3d. That before action it satisfied and discharged the plaintiff's claim by payment.

A. G. RIDDLE,
FRANCIS MILLER,
Attorneys for Deft.

Affidavit.

In the supreme court of the District of Columbia.

ELIZABETH V. KIMBRO, ADMR., &C.,
vs.
THE FIRST NATIONAL BANK OF W. } 9069.

A. G. Riddle, attorney for the bank, defendant, being sworn, says that the matters and things set forth in the defendant's pleas are true.

That he is informed and believes that the defendant did not at any time receive and have any money for the use of the plaintiff's intestate, nor did the defendant ever undertake or promise to pay the plaintiff's intestate as alleged in the declaration. The affiant is informed

14 and believes that the real and only foundation for the plaintiff's suit is a draft, drawn by the Treasurer of the U. S. upon the defendant in favor of Mrs. E. V. Kimbro for $3,415, dated March 9th, 1867, and which was never accepted by defendant, but which the defendant subsequently paid upon an endorsement duly authorized by the plaintiff.

A. G. RIDDLE.

Subscribed and sworn to before

R. J. MEIGS, *Clerk*,
By CHS. McNAMEE,
Asst. Clk.

22d Dec., 1871.

(Endorsed:) Filed 22d Dec'r, 1871.

Joinder of issue.

In the supreme court of the District of Columbia.

ELIZ. V. KIMBRO, ADM'X, &C.,
v.
FIRST NATIONAL BANK. } Joinder of issue.

The plaintiff joins issue upon the defendant's pleas.

J. DANIELS,
Atty. for Plff.

(Endorsed:) Filed 8 January, 1872.

Special replication.

In the supreme court of the District of Columbia, the day of November, 1872.

ELIZABETH V. KIMBRO, ADMX., *vs.* THE FIRST NAT. BANK. } At law. No. 9069.

And for replication to the deft's second plea the plaintiff says
15 that the said cause of action did accrue within three years before this suit.

And for a further replication to the defendant's second plea the plaintiff says that the money mentioned in the declaration was obtained by the defendant by means of fraud, and that said fraud was not discovered three years before this suit.

And for replication to defendant's third plea the plaintiff says that the defendant did not, before this action, satisfy and discharge the plaintiff's claim by payment.

J. DANIELS,
Plff's Atty.

(Endorsed:) Replication. Filed by leave of the court Nov. 23, 1872.

16 *Demurrer to replication.*

In the supreme court of the District of Columbia, the day of Nov'r, 1872.

KIMBRO *v.* FIRST NATIONAL BANK. } At law. No. 9069. Demurrer to replication.

The defendant says that the plaintiff's replication to its second plea is bad in substance.

RIDDLE & MILLER,
Attys. for Deft.

The points to be argued on this demurrer are:

1. That the replication does not aver that the money sued for was obtained by any fraudulent action on the part of the deft.

2d. That it does not aver that there was any fraudulent concealment of the facts on the part of the defendant.

3. That this suit being brought on the contract, & not on the alleged fraud, the statute is a bar.

R. & M.

(Endorsed:) Filed Nov. 25, 1872.

17 MONDAY, *December* 2, 1872.

Session resumed pursuant to adjournment, Chief-Justice Cartter presiding.

ELIZABETH V. KIMBRO, ADM'R OF ESTATE OF Samuel Kimbro, plff., *v.* THE FIRST NATIONAL BANK AT WASHINGTON, D. C., deft. } At law. No. 9069.

Upon argument of defendant's demurrer to plaintiff's second replica-

tion it is considered that said demurrer be and the same is hereby sustained.

18 *Additional replication.*

In the supreme court of the District of Columbia, the 3d day of December, 1872.

ELIZABETH V. KIMBRO, ADMINISTRATRIX OF the estate of Saml. Kimbro, dec'd,
vs.
THE FIRST NATIONAL BANK OF WASHINGTON, D. C. } At law. No. 9069.

And for a further replication to the deft.'s second plea, the plaintiff says that the said Saml. Kimbro, decd., was at the time and long before the said cause of action accrued "non compos mentis," and that he continued in that condition of mind until his death, which occurred on the 30th day of September, 1871.

J. DANIELS,
Plff's Atty.

(Endorsed:) Filed Dec. 3, 1872, by leave of court.

19 *Joinder of issue on replication.*

In the supreme court of the District of Columbia, the 20 day of Decr., 1872.

KIMBRO
v.
FIRST NATIONAL BANK. } At law. No. 9069.

The defendant joins issue on the plaintiff's replication to the defendant's second plea.

RIDDLE & MILLER,
Attorneys for Deft.

(Endorsed:) Filed 20 December, 1872.

Orders in circuit court.

MONDAY, *February 3rd*, 1873.

Session resumed rsuant to adjournment. Chief-Justice Cartter, presiding.

ELIZABETH V. KIMBRO, ADM'R OF SAMUEL Kimbro, plff.,
v.
THE FIRST NATIONAL BANK, DEFT. } At law. No. 9069.

And now comes the plaintiff's attorney, Mr. Thompson, and suggests the death of the plaintiff, and the same is not denied.

20 THURSDAY, *June* 19, 1873.

Session resumed pursuant to adjournment. Humphreys, justice, presiding.

ELIZABETH V. KIMBRO, ADMX. OF SAMUEL Kimbro, decd., plff.,
v.
THE FIRST NATIONAL BANK OF WASHINGTON, D. C., deft.
} At law. No. 9069.

And now comes here the attorney of the plaintiff and files the letters of administration de bonis non on the estate of Samuel Kimbro, decd., to A. F. Whitman, and he is made party plaintiff, with leave to prosecute this suit; whereupon comes here as well the plaintiff, by his attorney, Mr. Daniels, as the defendant, by its attorneys, Messrs. Riddle & Miller, and a jury of good and lawful men of this District, to wit, Pierce Klingle, William H. Brown, John E. Morse, William Coke, sr., Edgar F. Edwards, Lewis Sewall, Henry Ingle, William H. Wheeler,
21 Charles J. Bogan, Columbus I. King, Samuel Middleton, and William H. Brawner, who, being sworn to try the issue above joined, are respited until the meeting of the court to-morrow.

FRIDAY, *June* 20, 1873.

Session resumed pursuant to adjournment. Humphreys, justice, presiding.

A. F. WHITMAN, ADMR. DE BONIS NON OF Samuel Kimbro, decd., plff.,
v.
THE FIRST NATIONAL BANK OF WASHINGTON, D. C., deft.
} At law. No. 9069.

And now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited yesterday, who, after a further hearing of the case, are again respited until the meeting of the court on Monday next.

22 MONDAY, *June* 23, 1873.

Session resumed pursuant to adjournment. Humphreys, justice, presiding.

A. F. WHITMAN, ADMR. DE BONIS NON OF Samuel Kimbro, decd., plff.,
vs.
FIRST NATIONAL BANK OF WASH., D. C., DEFT.
} At law. No. 9069.

And now again come here the parties aforesaid, in manner aforesaid, and the same jury that was respited Friday last, who, after the case is given them in charge, on their oath say they find the issue aforesaid in favor of the plaintiff, and that the money payable to him by the defendant by reason of the premises is the sum of three thousand four hundred and fourteen dollars, with interest thereon from March 9th, A. D. 1867, besides costs. Therefore it is considered that the plaintiff recover against the defendant said sum of three thousand four hundred and fourteen dollars, with interest as aforesaid found, and $ costs of suit, and have execution thereof.

23 *Plaintiff's 1st bill of exceptions.*

In the supreme court of the District of Columbia.

ADMR. DE BONIS NON OF ELIZABETH V. KIMBRO, decd., who was admx. of Samuel Kimbro, decd.,
vs.
THE FIRST NATIONAL BANK OF WASHINGTON.

At law. No. 9069.
Plaintiff's exceptions.

Be it remembered that on the trial of this cause the defendant offered in evidence the power of attorney from Mrs. Kimbro, attached to the deposition of Rees W. Porter, of which the following is a copy:

Power of attorney.

Know all men by these presents that I, Elizabeth V. Kimbro, of the county of Davidson and State of Tennessee, have made, constituted, and appointed H. Tompkins and Co., Nashville, Tennessee, my true and lawful attorneys, for me and in my name, place, and stead to
24 demand, collect, and receive from the proper disbursing-officer of the Government the sum of three thousand four hundred and fourteen dollars, due me on the following-described draft, to wit, draft No. 9243, on war-warrant No. 915, dated Washington, D. C., March 9th, 1867, payable to the order of Elizabeth V. Kimbro, for thirty-four hundred and fourteen dollars, drawn on the Treasury of the United States, and payable at First National Bank of Washington, D. C., hereby empowering and authorizing my said attorneys to sign my name upon the back of said draft, as an endorsement, for the purpose of receiving the moneys due me on same as my attorneys in fact; giving and granting unto said attorney full power to , and to do and perform any and all acts touching these premises, hereby confirming and ratifying the same as fully as if I were personally present and did the same.

25 Witness my hand and seal this 15th day of April, 1867.

ELIZABETH V. KIMBRO. [SEAL.]

Signed and sealed in our presence.
H. E. SMITH,
WM. C. NICHOL.

STATE OF TENNESSEE,
County of Davidson:

On this 15th day of April, A. D. 1867, before me personally came Mrs. Elizabeth V. Kimbro, and acknowledged the signing and sealing of the above power of attorney to be her act and deed for the uses and purposes therein set forth.

Witness my hand and seal.

[SEAL.]

P. L. NICHOL,
Clerk Davidson Co. Court.

[50-cent U. S. rev. stamp. E. 26, 1867.]

(Endorsed:) Exhibit A to the deposition of Rees W. Porter. Power of attorney. From Elizabeth V. Kimbro to H. Tompkins and Co., Nashville, Tenn.

26 And the plaintiff's counsel objects to the introduction of said

power of attorney, which objection is overruled; and plaintiff, by counsel, excepts and tenders this their first bill of exceptions and asks the same to be signed and sealed, which is done accordingly.

D. C. HUMPHREYS. [SEAL.]

(Endorsed:) Plaintiff's 1st bill of exceptions. Filed June 20, 1873.

27 *Defendant's exceptions.*

In the supreme court of the District of Columbia, the day of , 1873.

ADMINISTRATOR D. B. N. OF SAMUEL KIMBRO *vs.* THE FIRST NATIONAL BANK OF WASHINGTON, D. C. } At law. No. 9069.

This cause coming on to be tried, to maintain the issues therein joined, the plaintiff read in evidence the deposition of E. V. Kimbro, wife and administratrix of Samuel Kimbro, as follows:

Deposition of Mrs. K.

In the supreme court of the District of Columbia.

ELIZABETH V. KIMBRO, ADMX., *vs.* THE FIRST NATIONAL BANK WASHINGTON, D. C. } At law. No.

DISTRICT OF COLUMBIA,
County of Washington, ss:

28 Be it remembered that at an examination of witnesses begun and held on the 4th day of January, A. D. 1873, and continued from time to time, by agreement, until the 6th day of January, A. D. 1873, when the within depositions were taken, I, Edward C. Ingersoll, U. S. commissioner, did cause to be personally present at the house No. , 10th st., in the city of Washington, in said District, Elizabeth V. Kimbro, to testify on the part and behalf of the plaintiff in a certain cause now depending in the supreme court of the District of Columbia, wherein Elizabeth V. Kimbro is plaintiff and the First National Bank, Washin., is defendant.

ELIZABETH V. KIMBRO, ADMX. ESTATE OF SAMUEL KIMBRO, deceased, *vs.* THE FIRST NATIONAL BANK, WASHINGTON, D. C. } At law. No.

29 Elizabeth V. Kimbro, aged 60 years, residing in Nashville, Tennessee, a witness produced, sworn, and examined on the part of the plaintiff in the above-entitled cause, deposes and says as follows:

I am the plaintiff in this case. This draft (here handed witness and marked "Exhibit E. V. K., No. 1) I understand to be the one that was issued to me upon my claim. (Counsel for deft. concede this to be the draft. E. C. Ingersoll, commr.) I never endorsed the name on the

back. It is not my signature; that is the name of E. V. Kimball or E. S. Kimball. I did not write either of the names. I never saw this draft until 1869, when I saw it in court. I never authorized anybody else to sign my name on the back of the draft or to indorse it. My husband was living in March, '67, when this draft was issued. He died a year ago last September. I know his handwriting. The signatures
30 on the back of the draft are not his handwriting. I never sold or transferred, or attempted to sell or transfer, my or any interest in this draft. My husband was never capable of attending to any business for years before March, 1867, and until he died. I noticed his mind seemed to be giving away about 1850, and he grew gradually worse until he died. In the spring of 1867, and some time previous, he was as helpless as a child. He could walk 'round, but if he went away from home he could not find his way back. If I spoke to him about business, he would say I had told him a word; he seemed to forget immediately anything I said about business. This condition of mind lasted until his death, and grew gradually worse before he died. He was entirely and totally incapable during this time of transacting any business, and never attempted it. This was the fact as far back as 1866.

31 Cross-examination by Mr. Riddle:

I was paid $725.00, I think, by Wm. A. Lord, representing Tompkins & Co. I know I was paid $725.00. I don't think I was paid any more.

Redirect:

At the time I was paid this money I did not know that my claim had been allowed or the draft issued. They would tell me whenever I went to their office that they were expecting my draft every day. They did not pay me all this money at one time; $200 was the most they ever paid me at once. I never knew the draft was issued until Glassy was appointed receiver. I received this money as advance, as was to return it when I got my claim through. I never received any money until 1867 & 1868.

ELIZABETH V. KIMBRO.

Sworn to and subscribed before me this 4th day of January, 1873.

EDWARD C. INGERSOLL,
U. S. Commissioner.

32 DISTRICT OF COLUMBIA,
County of Washington, ss:

I, Edward C. Ingersoll, U. S. commissioner, do hereby certify that in pursuance of agreement of counsel the foregoing deposition was taken down and by me reduced to writing in the presence of and from the statement of the witness, at the time and place designated in the caption thereof, and was then and there by me read over to the witness, and by her subscribed in my presence, and in the presence of counsel for the respective parties, who were then and there attending; the witness having been by me first duly sworn to testify the truth, the whole truth, and nothing but the truth touching the matters at issue in said cause.

I further certify that I am not of counsel for any of the parties to said cause, or in any manner interested therein.

EDWARD C. INGERSOLL,
U. S. Commissioner, D. C.

33 The plaintiff then called R. W. Taylor, First Comptroller of the Treasury of the United States, who gave evidence tending to prove that a certain draft (then handed to the witness) had been regularly issued by F. E. Spinner, Treasurer of the United States, in payment of a warrant signed by the then Secretary of the Treasury U. S. and by the witness in his official capacity, in favor of Mrs. Elizabeth S. Kimbro; that subsequently such draft had been submitted to him, together with the report of the said Treasurer that he had paid the same, whereupon the witness had directed and authorized the allowance of the amount thereof to the credit of said Treasurer in his accounts with the United States, about Apr. 30, 1867.

34 And the said witness further testified that the drawee of the said draft was at the date thereof a depositary and financial agent of the U. S.; that the funds of the U. S. against which such draft was drawn, then in the hands of such drawee, were treated in the Treasury Department and by the Treasurer aforesaid as in fact in his, the said Treasurer's, own charge & custody, and that for it said Treasurer was held responsible precisely as if it had been in his own office; that said Treasurer had power to draw the draft in payment of said warrant upon himself, or any assistant treasurer or U. S. depository in the United States, for the convenience of his own office, and that in either case the mode of payment and of accounting as between the Treasurer and his subordinates, and as between the Treasurer and the Government, was the same. And this witness fur-

35 ther testified that no power of attorney accompanied the draft, and that the name on the back of said draft was treated as the genuine signature of Mrs. Kimbro.

The plaintiff then, to further maintain the issues in said action on her behalf, called as a witness J. H. Arnold, who gave testimony tending to show that on or about the day of April, 1867, the First National Bank of Washington made its weekly statement to the Treasurer aforesaid of deposits secured and payments made, returning the draft aforesaid as paid by them on the 22nd day of April, 1867, and that the amount of said draft was entered to the full credit of said bank in its account with said Treasurer on the 30th day of April, 1867. The plaintiff then offered to read the said draft in evidence, to which the counsel for the defendant objected; but the objection was over-

36 ruled, and said draft was admitted to be read to the jury, as follows:

Draft No. 9243 *on war warrant No.* 915.

$3,414.] TREASURY OF THE UNITED STATES,
Washington, March 9, 1867.

Pay to the order of Mrs. E. S. Kimbro three thousand four hundred and fourteen dollars.

No. 9243.] Registered March 9, 1867.
Issued on requisition No. . ($3,414.)

S. B. COLBY,
Register of the Treasury.
F. E. SPINNER,
Treasurer of the United States.

To the FIRST NATIONAL BANK OF WASHINGTON, D. C.

To which admission the counsel for the defendant excepted, and their exception was allowed; whereupon they prayed the court to sign, seal,

and cause to be enrolled this their first bill of exceptions; which is
37 accordingly done this 23d day of June, 1873.

D. C. HUMPHREYS. [SEAL.]

The plaintiff then gave evidence to prove that J. Daniels, esq., as attorney for Mrs. Kimbro, in the spring of 1869 had demanded payment of the money represented by the draft in question of the First National Bank of Washington, which payment had been refused by said bank; and on cross-examination it appeared that the said draft had never come to the possession of either Mr. Kimbro or Mrs. Kimbro, and that at the time of said demand the draft in question was on file in the U. S. Treasury Department.

The plaintiff here rested, and the counsel for the defendant demurred to the evidence, and asked the court to direct the jury to bring
38 in a verdict for the defendant; which prayer the court refused to grant; to which refusal the counsel for the defendant excepted, and their exception was allowed; whereupon the counsel for defendant prayed the court to sign, seal, and cause to be enrolled this their second bill of exceptions; which is accordingly done this 23d day of June, 1873.

D. C. HUMPHREYS. [SEAL.]

Whereupon the counsel for the defendant gave in evidence various depositions tending to prove that the firm of H. Tompkins & Co., composed of H. Tompkins, Rees W. Porter, & Wm. A. Lord, were engaged in prosecuting claims against the United States; that among others they prosecuted a claim in the name of Elizabeth V. Kimbro, in payment of which the draft in question was issued. That the said firm at
39 the time of beginning the prosecution said claim, and for some time thereafter, were ignorant that Samuel Kimbro, the husband of Elizabeth, was alive, but that one of the firm saw said Samuel Kimbro in Nashville at one time when Mrs. K. came to the office about her claim during the prosecution of said claim; and that Mrs. K. told one of said firm that Mr. K. was hippoed & low-spirited, & she could not get him to attend to any business. That said Elizabeth alone attended to the business of said claim, and gave all directions to them in regard thereto.

The following power of attorney was made an exhibit to Rees W. Porter's deposition:

Exhibit A to R. W. Porter's deposition.

POWER OF ATTORNEY.

Know all men by these presents that I, Elizabeth V. Kimbro,
40 of the county of Davidson, and State of Tennessee, have made, constituted, and appointed N. Tompkins & Co., Nashville, Tennessee, my true and lawful attorneys, for me and in my name, place, and stead to demand, collect, and receive from the proper disbursing-officer of the Government the sum of three thousand four hundred and fourteen dollars, due me on the following-described draft, to wit: Draft No. 9243, on war warrant No. 915, dated Washington, D. C., March 9, 1867, payable to the order of Elizabeth V. Kimbro, for thirty-four hundred and fourteen dollars, drawn on the Treasury of the United States, and payable at First National Bank of Washington, D. C.; hereby empowering and authorizing my said attorneys to sign my name upon the back of said draft,

as an endorsement, for the purpose of receiving the moneys due
41 me on same, as my attorneys in fact; giving and granting unto said attorneys full power to , and to do and perform any and all other acts touching these premises, hereby confirming and ratifying the same as fully as if I were personally present and did the same.

Witness my hand and seal this 15th day of April, 1867.

[SEAL.] ELIZABETH V. KIMBRO.

Signed and sealed in our presence—
H. E. SMITH.
WM. C. NICHOL.

STATE OF TENNESSEE,
City of Davidson :

On this 15th day of April, A. D. 1867, before me personally came Mrs. Elizabeth V. Kimbro, and acknowedged the signing and sealing of the above power of attorney to be her act and deed for the uses and purposes therein set forth.

[SEAL.] R. S. NICHOL,
Clerk Davidson Co. Court.

[50 ct. int. rev. stamp. E. V. K. Feb. 26, 1867.]

42 The defendant further offered evidence tending to prove that said power of attorney was duly executed and acknowledged before P. A. Nichol, clerk of the court of Davidson County, Tenn., and the evidence of the cashier of the Second National Bank of Nashville that Wm. A. Lord, one of the said firm of H. Tompkins & Co., brought the said draft and said power of attorney to said bank, and, exhibiting said power of attorney as his authority so to do, endorsed the name of the payee of said draft on the back thereof, and that, relying on said power of attorney, his bank paid the amount of said draft to said Wm. A. Lord.

The defendant further offered evidence tending to prove that the said firm of H. Tompkins & Co. had paid to the said E. V. Kimbro, on account of said draft, $920, and that the compensation first agreed
43 on between Mrs. Kimbro and H. Tompkins & Co. for the services of the latter in regard to said claim was ten per cent., but that afterwards , & before the allowance of said claim, the rate of compensation was, by consent of both parties, raised to 33⅓ per cent.

The defendant further offered in evidence, on the point of the waiver of Mrs. Kimbro's right of survivorship to the chose in action in controversy on the death of her husband, and generally for whatever purpose it might be competent, the record of this court in the case of E. V. Kimbro vs. The First National Bank of Washington, D. C.

The following are the pleadings in said cause:

Declaration.

In the supreme court of the District of Columbia, the 29th day of July, 1869. Case No. 5986.

44 ELIZABETH V. KIMBRO, PLAINTIFF,
vs.
THE FIRST NATIONAL BANK OF WASHINGTON, D. C., defendant. } At law. No. 5986.

FIRST COUNT.—The plaintiff sues the defendant for that the defendant

detains from the plaintiff her draft, No. 9243, on war-warrant No. 915, for three thousand four hundred and fourteen dollars, dated March 9, 1867, drawn by F. E. Spinner, Treasurer of the United States, in favor of the plaintiff on said defendant, and which draft is in the following words and figures, to wit:

Draft No. 9243 on war-warrant No. 915.

$3,414.] TREASURY OF THE UNITED STATES,
Washington, March 9, 1867.

Pay to the order of Mrs. E. S. Kimbro three thousand four hundred and fourteen dollars.

45 No. 9243.] Registered March 9, 1867. Issued on requisition No.

$3,414.] S. B. COLBY,
Register of the Treasury.
F. E. SPINNER,
Treasurer of the United States.

To the FIRST NATIONAL BANK OF WASHINGTON, D. C.

SECOND COUNT.—And the plaintiff sues the defendant for work done and material provided by the plaintiff for the defendant at the defendant's request.

THIRD COUNT.—For money lent by the plaintiff for the defendant at the defendant's request.

FOURTH COUNT.—For money paid to the plaintiff for the defendant at the defendant's request.

FIFTH COUNT.—For money received by the defendant for the use of the plaintiff.

46 SIXTH COUNT.—For money found to be due from the defendant to the plaintiff on account stated between them. And the plaintiff claims three thousand four hundred and fourteen dollars, with interest thereon from the ninth day of March, 1867.

J. DANIELS,
J. L. JOHNSON,
M. THOMPSON,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the first special term of the court, occurring twenty days after the service hereof; otherwise judgment.

J. DANIELS,
J. L. JOHNSON,
M. THOMPSON,
Attorneys for Plaintiff.

Pleas.

In the supreme court of the District of Columbia, the day of , 18

ELIZABETH V. KIMBRO
vs.
THE FIRST NATIONAL BANK OF WASHINGTON, D. C. } At law. No. 5986.

47 1. The defendant says that the defendant did not and does not detain the said draft as alleged in the first count.

2. The defendant, for a further plea, says that it never was indebted as alleged in the second count.

3. The defendant, for a further plea, says that it never was indebted as alleged in the third count.

4. The defendant, for a further plea, says that it never was indebted as alleged in the fourth count.

5. The defendant, for a further plea, says that it never was indebted as alleged in the fifth count.

6. The defendant, for a further plea, says that it never was indebted as alleged in the sixth count.

7. And the defendant, for a further and final plea, says that it
48 is not and never was indebted in the sum of three thousand four hundred and fourteen dollars, ($3,414,) with interest thereon from March 9, 1867, or in any other sum, as alleged in the seventh count or claim for damages.

JOHN A. WILLS,
Attorney for Defendant.

Joinder of issue on pleas.

In the supreme court of the District of Columbia, the 13th day of September, 1869.

ELIZABETH V. KIMBRO
vs.
THE FIRST NATIONAL BANK OF WASHINGTON, D. C. } At law. No. 5986.

The plaintiff takes issue upon the defendant's 1st, 2d, 3d, 4th, 5th, 6th, and 7th pleas.

M. THOMPSON,
For Plaintiff.

49 To the admission of which record the counsel for the plaintiff objected, and the court sustained the objection and refused to allow the same to be read; to which refusal the counsel excepted, and his exception was allowed.

Whereupon the said counsel for the defendant prayed the court to sign and seal and cause to be enrolled this their third bill of exceptions, which is accordingly done this 23rd day of June, 1873.

D. C. HUMPHREYS. [SEAL.]

And the defendant rested.

Thereupon the plaintiff's counsel read certain depositions tending to prove irregularities in the office of the clerk of the court of Davidson County, Tenn.

And plaintiff rested.

Whereupon the counsel for the defendant asked the court to instruct the jury as follows:

50 *Defendant's prayers for instructions.*

1. From the evidence in the case, in regard to the prosecution in her own name of the claim, which was the consideration of the draft in question, issued as it was to her in her own right, the jury are at liberty to presume that Mrs. Kimbro had authority to attend to all matters con-

nected with said claim, and therefore to execute the power of attorney in evidence as Exhibit A of Rees W. Porter's deposition. Granted.

2. The presumption of law is that the power of attorney in evidence, being duly attested by the clerk and seal of the court of Davidson County, Tenn., is a good and valid power of attorney, and the burden of proof is on the plaintiff to show that it is invalid. Refused.

51 3. If Mrs. K. had authority to execute the power of attorney, Exhibit A to Porter's deposition, said power of attorney was a sufficient authority for the firm of H. Tompkins & Co. to place her name on the back of the draft in question and receive the money thereon, and if they did so, the plaintiff cannot recover in this suit. Granted.

4. If the jury find the facts to be that the said power of attorney was executed and acknowledged, with blanks to be filled in with description of the draft, and the same was left in the hands of H. Tompkins & Co. to be used by them, and that they subsequently filled the blanks, and by that means placed the name of the plaintiff on the back of draft, and thereby induced the defendant, or the party from

52 whom the draft came to the defendant, to cash the same without notice of the facts that said blanks had been so filled up, the plaintiff cannot recover in this suit. Granted.

5. If the jury find that the power of attorney was executed and acknowledged with blanks for the description of the draft, and that the power so executed was left with H. Tompkins & Co. for use, then, as between this plaintiff and defendant, that power of attorney was sufficient authority for them to fill up said blanks with such description and to use the same in uttering said draft, and that if they did so fill up and so use said power the plaintiff cannot recover in this suit. Granted.

6. That if under all the evidence and the instructions of the court the jury find for the plaintiff, the amount of the verdict will be

53 the amount of the draft less the amount to be paid for prosecuting said claim and the amount paid the plaintiff to apply on the same. Granted.

7. That if the jury believe that the credit given to the defendant by the United States Treasury was given on the faith of the genuineness of the signature of Mrs. K., then the plaintiff must look to the United States for her remedy, and cannot recover in this action. Refused.

8. In the absence of other proof than that a note or draft issued payable to the order of a married woman, it must be presumed that the meritorious consideration therefor sprung from herself and not from her husband, and that if the husband dies without having reduced the

54 note or draft to his possession, the absolute ownership thereof vests eo instanti in the wife, payee named in the note, and when the ownership of a chose in action has vested in one person, action thereon cannot be maintained in the name of another person, nor in the name of his representative without proof of an actual assignment. Refused.

9. Unless the jury find from the evidence that the draft in question was presented to the First National Bank, and accepted by said bank in favor of the plaintiff's decedent, they must render a verdict for the defendant. Refused.

10. The defendant, in payment of the draft in evidence, acted as the agents of the United States Government, and particularly of the United States Treasurer, and are not liable in this action. Refused.

55 11. If the jury, from all the evidence, find that in paying the draft in question the defendants acted as the agents of the Treas-

urer of the United States, then the defendants are not liable in this action. Refused.

12. If the jury believe, from all the evidence, that the draft in question was issued to Elizabeth Kimbro upon a claim of hers against the United States, and that her husband, during his life-time, never reduced the said draft to his possession, then, upon his death prior to the commencement of this action, the cause of action thereon became hers absolutely, and did not belong to the estate of the said husband; and if the jury are further satisfied that the said Elizabeth Kimbro has never intended to waive her rights of property therein, then the repre-
56 sentative of her husband's estate has no interest in the subject-matter of this action, and the jury must render a verdict for the defendant. Granted.

13. If the jury find, from all the proofs in the case, that the draft in evidence was issued to Elizabeth Kimbro during coverture, and that prior to the commencement of this action her husband died without having at any time reduced said draft to his possession, then the action cannot be maintained by the representative of the estate of her deceased husband, and the jury must return a verdict for the defendant, unless they further find that intermediate her husband's death and the commencement of this action she transferred the cause of action herein to the estate of her husband. Refused.

57 14. Unless the jury find that Samuel Kimbro, at the time the draft in evidence was issued, was not of sufficiently sound mind to be capable of making a valid contract or attending to his business, the right of action in this case is barred by the statute of limitations, and verdict must go for the defendant. Refused.

15. If the jury find that, at the date of said draft, said Samuel Kimbro was of unsound mind, and if they further find that Mrs. Kimbro had right or authority to prosecute in her own name the claim in payment of which said draft was issued, then, without further evidence, it is competent for the jury to find that she had full right or authority to execute the power of attorney given in proof on the part of the defend-
58 ants; and should they find she had not right or authority, and that she did execute and acknowledge the said power of attorney, whether the same was in blank or not, and delivered it to the firm of H. Tompkins & Co., and that one of the said firm wrote her name on the back of the draft, and that, relying upon such endorsement, the defendants paid the draft, the jury should find for defendant. Refused.

And the court granted the first, third, fourth, fifth, sixth, and twelfth prayers, and refused to grant all the others, to which refusal the counsel for the defendant excepted, and their exception was allowed; whereupon they prayed the court to sign, seal, and cause to be enrolled this their fourth bill of exceptions, which is accordingly done this 23rd day of June, 1873.

D. C. HUMPHREYS. [SEAL.]

59 After which the jury retired, and on returning rendered a verdict in favor of the plaintiff for $3,414, with interest from the 9th day of March, 1867.

(Endorsed:) Filed July 1, 1873.

60 THURSDAY, *June* 26, 1873.

Session resumed pursuant to adjournment. Humphreys, justice, presiding.

A. F. WHITMAN, ADMR. DE BONIS NON OF SAMUEL KIMBRO, plff.,
v.
THE FIRST NATIONAL BANK OF W., D. OF C., deft. } At law. No. 9069.

And now again comes here the defendant, by its said attorney, and moves the court for a new trial, for the following reasons:

1st. The verdict was contrary to the evidence.

2d. The verdict was contrary to the law as laid down by the court.

3d. For errors in the rulings of the court during the progress of the trial, and in refusing the instructions asked for by the defendant.

61 TUESDAY, *July* 1, 1873.

Session resumed pursuant to adjournment. Humphreys, justice, presiding.

A. F. WHITMAN, ADMR. DE BONIS NON OF SAMUEL KIMBRO, decd., plff.,
v.
THE FIRST NATIONAL BANK OF WASHINGTON, D. C., deft. } At law. No. 9069.

And now again comes here as well the plaintiff as the defendant, by their respective attorneys, and thereupon the plaintiff remits the sum of nine hundred and twenty dollars from the judgment entered in this case. Whereupon, upon argument of so much of defendant's motion for a new trial as is addressed to the discretion of the court, it is considered that the same be, and is hereby, refused and overruled.

62 *Motion to settle case under 69 rule.*

In the supreme court D. C., the 11th day of July, 1873.

KIMBRO'S ADMR. D. B. N.
vs.
THE FIRST NATIONAL BANK OF WASHINGTON. } At law. No. 9069.

Motion to sign and settle case stated.

And now comes the said defendants, by William A. Meloy, their counsel, and the said plaintiff, by J. Daniels, esq., her counsel, and the counsel for the said defendants presents the case made on behalf of the defendants under and in pursuance of the 69th rule of the court at common law, and submitted to the opposite counsel, and they being unable to agree upon the settlement thereof, moves the court now here to settle and sign the same.

WM. A. MELOY,
FRANCIS MILLER,
Attys. for Deft.

(Endorsed:) Filed July 11, 1873.

63 MONDAY, *July* 28, 1873.

Session resumed pursuant to adjournment. Humphreys, justice, presiding.

A. F. WHITMAN, ADMR. DE BONIS NON OF SAMUEL KIMBRO, decd., plff.,
v.
THE FIRST NATIONAL BANK OF WASH'N, DEFTS. } At law. No. 9069.

This case coming on to be heard on the motion of counsel for the defendant to settle and sign a case made on the part of the defendant under the 69th common-law rule, the said motion is hereby overruled.

64 *Orders of court in general term.*

THURSDAY, *April* 23, 1874.

Session resumed pursuant to adjournment. Present, Chief-Justice Cartter and Justices Olin, Wylie, Humphreys, and MacArthur.

A. F. WHITMAN, ADMINISTRATOR DE BONIS NON of Samuel Kimbro, deceased, appointed instead of Elizabeth V. Kimbro, deceased, administrator of said Samuel Kimbro, plaintiff,
vs.
THE FIRST NATIONAL BANK OF WASHINGTON, D. C., defendant. } At law. No. 9069.

Argued by Francis Miller, for the defendant, appellant, and J. Daniels, for the plaintiff, and submitted to the court.

65 SATURDAY, *June* 6, 1874.

Session resumed pursuant to adjournment. Present, Justice' Olin, Wylie, Humphreys, and MacArthur.

A. F. WHITMAN, ADMINISTRATOR DE BONIS NON of Samuel Kimbro, deceased, appointed instead of Elizabeth V. Kimbro, deceased, administra'rix of said Samuel Kimbro, plaintiff,
vs.
THE FIRST NATIONAL BANK OF WASHINGTON, D. C., defendant. } At law. No. 9069.

And now come here again as well the plaintiff as the defendant, by their respective attorneys, and thereupon, because it seems to the court here that there is no error in the record and proceedings of the circuit court or in its judgment, therefore it is considered that the defendant's aforesaid motion for a new trial upon exceptions be, and the same is hereby, overruled, and that the judgment aforesaid of the said circuit court be, and the same is hereby, affirmed; and that the plaintiff recover against said defendant the costs of the cause in this court, to be taxed by the clerk, and that the plaintiff have execution accordingly.

66 *Motion for judgment against sureties.*

In the supreme court of the District of Columbia, in general term.

A. F. WHITMAN, ADMR. DE BONIS NON OF THE estate of Elizabeth V. Kimbro, deceased,
vs.
THE FIRST NATIONAL BANK OF THE CITY OF Washington. } No. 9069.

The judgment of the court below in the above cause having been affirmed by this court, the plaintiff, by his counsel, now comes and moves the court for judgment against William H. Bundy and David Rittenhouse, sureties, who undertook to pay the judgment in this case, as will appear by their obligation duly filed herein.

J. DANIELS,
Plff.'s Atty.

(Endorsed:) Filed & submitted to court June 20, 1874.

67 SATURDAY, *June* 20, 1874.

Session resumed pursuant to adjournment. Present, Justices Olin, Wylie, Humphreys, and MacArthur. Absent, Chief-Justice Cartter.

A. F. WHITMAN, ADMINISTRATOR DE BONIS NON of Samuel Kimbro, deceased, appointed instead of Elizabeth Kimbro, deceased, administratrix of said Samuel Kimbro, plaintiff,
vs.
THE FIRST NATIONAL BANK OF WASHINGTON, D. C., defendant, and William H. Bundy and Daniel Rittenhouse, sureties of said defendant for appeal, defdts. } At law. No. 9069.

And now comes the plaintiff, by his attorney, J. Daniels, and moves the court for judgment against said sureties, upon their undertaking to abide by, perform, and pay the judgment of this court in the above-entitled cause:

Whereupon it is considered that the plaintiff recover against the said William H. Bundy and David Rittenhouse, sureties as aforesaid, two thousand four hundred and ninety-four dollars, with interest thereon from March 9, 1867, the same being the amount of plaintiff's re-
68 covery against the defendant, The First National Bank of Washington, D. C., and the further sum of $ for costs of suit, and have execution thereof.

Authentication of record.—Clerk's certificate.

Clerk's office, supreme court of the District of Columbia.

I, R. J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals, together, constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 23rd day of October, 1874.

[SEAL.]

R. J. MEIGS, *Clerk*,
By JOB BARNARD,
Assistant Clerk.

Cost of transcript, $20.00.

(Indorsement on cover:) No. 211. The First National Bank of Washington, plaintiff in error, vs. A. F. Whitman, admr. de bonis non of Samuel Kimbro, decd. Dist. of Columbia sup. court. Filed 24th October, 1874.

Supreme Court of the United States.

No. 211.

THE FIRST NATIONAL BANK OF WASHINGTON,
PLAINTIFF IN ERROR,

vs.

A. F. WHITMAN, ADMINISTRATOR *de bonis non* OF SAMUEL KIMBRO, DECEASED.

In Error to the Supreme Court of the District of Columbia.

BRIEF OF THE PLAINTIFF IN ERROR.

A. G. RIDDLE,
FRANCIS MILLER,
Attorneys for Defendant.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 211.

THE FIRST NATIONAL BANK OF WASHINGTON,
PLAINTIFF IN ERROR,

vs.

A. F. WHITMAN, ADMINISTRATOR *de bonis non* OF SAMUEL KIMBRO, DECEASED.

In Error to the Supreme Court of the District of Columbia.

BRIEF OF THE PLAINTIFF IN ERROR.

Statement of Facts and History of the Case.

The intestate and his wife lived in the State of Tennessee.

The defendant claims that for several years prior to his death Samuel Kimbro was mentally incompetent to transact business.

In the lifetime of her husband Mrs. Kimbro employed H. Tompkins & Co., for her and in her name and right, to prosecute a claim against the United States. There is no evidence that the claim was not hers, and in her testimony she speaks of it as "my claim." (R., p. 10.)

On the 9th of March, 1867, the Treasurer of the United States, in payment of this claim, drew a draft on the plaintiff, his depositary and financial agent, for $3,414, payable to Mrs. Kimbro's order. This draft came into the hands of

her attorneys, Tompkins & Co. The plaintiff claims that by virtue of the power of attorney, given on pp. 9 and 13 of the Record, Wm. A. Lord, one of the said firm, endorsed Mrs. Kimbro's name on said draft and transferred it to the Second National Bank of Nashville, Tennessee, from which it came through a bank in New York to the plaintiff.

The defendant alleges that said power of attorney was invalid, and the endorsement a forgery. The draft was forwarded to the plaintiff by the New York bank and was paid on the 22d day of April, 1867. On settlement with the Treasurer of the United States, April 30, 1867, the bank had credit for the payment and the Treasurer took the draft.

On the 29th of July, 1869, Mrs. Kimbro, without any demand, commenced a suit in her own name and right against the plaintiff, adding the common counts to the count on the draft itself. On the trial she obtained a verdict, which the General Term set aside, and this case remains still pending and undisposed of in the supreme court of the District of Columbia. (See Record of this case, pp. 14–16.) Samuel Kimbro died September 30, 1871.

November 29th, 1871, Mrs. Kimbro, as administratrix of her husband, commenced the case at bar, and on her death the defendant, Whitman, administrator *de bonis non*, became the defendant.

The declaration counts on—

Money loaned.
Money paid by the plaintiff (defendant in error.)
Money received by the defendant, &c.

The pleas were—

1st. Never indebted.
2d. The Statute of Limitations.
3d. Payment.

Issue was joined on these pleas January 8, 1872, and on November 23d, 1872, by leave of the Court, and without any withdrawal of the issue, the defendant in error filed two replications to the plea of the statute, one of them being "that the money mentioned in the declaration was obtained by the defendant by means of fraud, and that said fraud was not discovered three years before this suit."

To this replication the defendant below demurred, on the following grounds:

1st. That the replication does not aver that the money sued for was obtained by any fraudulent action on the part of the defendant.

2d. That it does not aver that there was any fraudulent concealment of the facts on the part of the defendant.

3d. That this suit being brought on the contract, and not on the alleged fraud, the statute is a bar.

The demurrer was sustained, and by leave of the Court the plaintiff below replied to the second plea, that Samuel Kimbro "was, at the time and long before the cause of action accrued, *non compos mentis*, and so continued till his death," on which replication issue was joined.

Assignment of Errors.

I. The Court erred in holding that the defendant could maintain his suit against the plaintiff.

Note.—This covers the plaintiff's first and second exceptions, and also the exception to the refusal of the 7th, 9th, 10th and 11th prayers.

II. The Court erred in holding there was a right of action in the intestate.

Note.—This covers the plaintiff's 3d exception, and the refusal of the 8th, 13th and 15th prayers.

III. The Court erred in refusing to submit the issue on the second plea to the jury.

Note.—This refers to the refusal of the 14th prayer.

IV. The Court erred in refusing the second prayer.

PLAINTIFF'S POINTS ON THE ERRORS ASSIGNED.

I.

The Defendant cannot maintain this Action.

a. The plaintiff was the mere agent of the United States, and money in its hands was money in the Treasury of the United States.

See Evidence of Comptroller Taylor, R., p. 12.
13 Stat. at Law, 113, § 45.
Revised Statutes, § 5153.

The defendant must have been aware of the fact of this agency before the commencement of this suit.

b. The Treasurer of the United States had, four years before the bringing of this suit, settled with the bank, its agent, and ratified its act in paying the draft. (R., p. 12.)

The Treasurer was bound to know the signature of his payee, which was entirely unknown to the bank.

2 Parsons on N. & B., 592 and notes; Id., 72.
1 Parsons on N. & B., 321 and notes.
Smith *vs.* Mercer, 6 Taunton, 76.
Price *vs.* Neil, 3 Burrows, 1354.
Sadler *vs.* Evans, 4 Burrows, 1986.
Bank of U. S. *vs.* Bank of Georgia, 10 Wheat, 333.
Levy *vs.* Bank of U. S., 1 Binn., 30; S. C., 4 Dall, 234.

c. There was no privity between the plaintiff and defendant.

The settlement made by the Treasurer of the United States with the plaintiff had no effect whatever upon the relations of the plaintiff and defendant.

Bank of Republic *vs.* Millard, 10 Wall., 152.
1 Parsons on N. & B., 339.
2 Parsons on N. & B., 59–61 and notes; Id., 72,
Williams *vs.* Everett, 14 East., 582.
Wedlake *vs.* Hurley, 1 Cromp. & Jar., 83.
Crow *vs.* Rogers, 1 Stra., 592.
Rogers *vs.* Kelley, 2 Campb., 123.
Yates *vs.* Bell, 3 B. & Ald., 643.
Wharton *vs.* Walker, 4 B. & Cres., 163.
1 Archb. N. P., 22–24, marginal.
Chapman *vs.* White, 2d Selden, (N. Y.) 412.

d. As between the plaintiff and defendant, any loss accruing from the misconduct of Tompkins & Co. must fall on the defendant by whose act they obtained power to cause such loss, and not on the plaintiff to whom they were unknown.

If one of two innocent parties must suffer from the fraud of a third, is should manifestly be he whose laches or misplaced confidence has enabled that third party to commit the fraud.

Young *vs.* Grote, 4 Bing., 253.
Pickard *vs.* Lears, 6 Ad. & El., 469.

II.

There can be no right of action in the defendant.

The claim belonged to Mrs. Kimbro, was prosecuted in her name and for her use, the draft ran to her, and never was transferred to her husband or to his estate. It was

never in the possession of her husband, and of course was never reduced to possession by him, and "the right of the wife to *choses in action* coming to her during coverture, survives to her, unless the husband reduces them to possession."

1 Kent's Com., 135*.
1 Parsons on N. & B., 87.
Gallego *vs.* Gallego, 2 Brock., 285.
Hayward *vs.* Hayward, 20 Pick., 518.
Draper *vs.* Jackson, 16 Mass., 480.
Poor *vs.* Hazelton, 15 N. H., 564.
Fisk *vs.* Cushman, 6 Cush., 20.

There can be no doubt that the defendant was misled into bringing the action in this form by the opinion of the Court *in banc* on the trial of the case of Eliz. V. Kimbro *vs.* First National Bank, in which a distinction is drawn between *choses in action* coming to the wife before and after coverture, and it is held that those coming before coverture have to be reduced to possession by the husband during his life, or they survive to the wife; but those that are received by her during coverture becomes his *absolutely.*

See Kimbro *vs.* First National Bank, 1 McArthur, 415.

III.

The issue on the replication of *non compos mentis* was clearly made by the pleadings and should have been left to the jury.

There was no pretence of any mental alienation on the part of Samuel Kimbro until all chance of maintaining the action was lost, unless some such excuse could be made effectual to prevent the running of the statute. The 14th prayer should therefore have been granted.

IV.

The court should have granted the plaintiff's second prayer.

Clearly the burden of invalidating the power of attorney was on the defendant after the plaintiff had proven her signature to it, and the execution of the paper had been established by the seal and signature of the clerk of the Court, duly proven, and the power had been admitted as evidence in the case.

A. G. RIDDLE,
FRANCIS MILLER,
Attorneys for Defendant.

Supreme Court of the United States.

No. 211.

THE FIRST NATIONAL BANK OF WASHINGTON,
Plaintiff in Error,
vs.
A. F. WHITMAN,
Administrator de bonis non of Samuel Kimbro, deceased.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR—HISTORY OF THE CASE.

On the 9th day of March, 1867, the Treasurer of the United States issued his draft upon the First National Bank of the City of Washington for the sum of three thousand four hundred and fourteen dollars, payable to the order of Mrs. E. V. Kimbro, by the name of E. S. Kimbro, upon the settlement of a claim against the Government of the United States for property taken from the farm of her husband for the use of the army during the war of the rebellion. She was then living in Tennessee with her husband, who (as the evidence shows) was at that time *non compos mentis*. The draft was by the Treasurer of the

United States delivered to the firm of H. Thompkins & Co., claim agents at Nashville, Tenn., with whom Mrs. Kimbro had intrusted the prosecution of her claim.

From the evidence it appears that this draft, after falling into the hands of Thompkins & Co., was, on or about the 15th day of April, 1867, (about three weeks after it was issued,) cashed by the Second National Bank of Tennessee upon the blank endorsement of Mrs. Kimbro's name, which endorsement was not the genuine signature of Mrs. Kimbro, was not authorized by her, and is claimed to be a forgery.

The draft was forwarded to the Fourth National Bank of New York for collection, and thence to the First National Bank of Washington, (the drawee,) where it was paid. The fact that the draft was issued, and of its payment, did not come to the knowledge of Mrs. Kimbro until the winter of 1869, when she brought suit against the bank in her own name, under our statute of 1869, to recover the amount. That action was tried in the winter of 1870, and a verdict found for the plaintiff, a new trial asked for and denied.

The defendant appealed to the general term, and after argument the verdict and judgment were set aside, and the case remanded to the Court below, "to be proceeded in according to law," for the reason that the plaintiff being a married woman, and the draft coming to her during coverture, it vested absolutely in her husband, and therefore the action could not be maintained by her, under the act of 1869.

Meantime the husband died. Mrs. Kimbro was appointed administratrix of her husband's estate, and in that capacity brought this action. Pending the action, she died, and A. J. Whitman was appointed administrator, *de bonis non.* The case was again tried in the circuit, and a verdict for the plaintiff for the amount of draft, with interest from the date of draft. A *remittitur* was then filed for what had been paid by H. Thompkins & Co., and a judgment entered for the balance.

FIRST ASSIGNMENT OF ERRORS.

"The plaintiff then offered to read the said draft in evi-"dence, to which the counsel for the defendant objected; but "the objection was overruled, and said draft was admitted to "be read to the jury, as follows:

"Draft No. 9,243, on War Warrant No. 915.

"$3,414.] TREASURY OF THE UNITED STATES,

"WASHINGTON, *March* 9, 1867.

"Pay to the order of Mrs. E. S. Kimbro three thousand "four hundred and fourteen dollars.

"No. 9,243.] Registered March 9, 1867.

"Issued on requisition No. ——. ($3,414.)

S. B. COLBY,
Register of the Treasury.
F. E. SPINNER,
Treasurer of the United States."

This is a general objection, no reason for it being given; nor is the ground of the objection stated, and whether it was properly overruled or not, it cannot now be considered by this Court. To entitle the objection to be reviewed by this Court, the particular ground upon which it was made should have been stated to the Court below. (See Camden *v.* Doremus, 3 Howard, 515; 15th Curtis, 535.) The plaintiff in error is confined to the specific objection to the admissibility of evidence taken in the Court below, and where the specific ground is not stated the ruling of the Court cannot be reviewed. See Hinde's Lessee *v.* Longworth, 11 Wheaton, 199, (6 Curtis, 560;) Fields *v.* Hunter, 8 Miss., 128. But even though this rule was waived, it will be seen by reference to the instrument itself, to which objection was made, (see page of the Record ,) that the draft was proper evidence to establish the claim, and that the objection that it was issued to Mrs. Kimbro during coverture and not reduced to possession by her husband, therefore the right of action survived to her could not avail for the reason—

1st. That choses in action of a wife coming to her during coverture vest absolutely *eo. instanti* in the husband without any act on his part to reduce them to possession. See the opinion of the Court in Kimbro *vs.* The First National Bank above referred to in the history of this case, decided December, 1870. See also 1st East., 432; 6 Johnson's Reports, 112, Mass. 229; Lighthouse *v.* Penniman, 2 Conn., 564, and Lightburn *v.* Halladay, 2d Equity Cases Ab., 1.

2d. And even if it were not so, the objection would fail in this, as the husband was insane, or *non compos mentis*, at the time the draft issued, and remained so until death, which fact was one of the issues made by the pleadings and submitted to the jury, and his estate could not be prejudiced by not doing an act of which he was totally incapable; and,—

3d. Even if the right of action had survived to her, she had a right to waive it in favor of the estate of her husband, and bringing suit in her official capacity as administratrix of her husband's estate is a fair legal presumption that she so intended.

The second assignment of error is based upon the refusal of the Court to sustain the demurrer of the defendant to the evidence given by the plaintiff. (See page of the printed Record.) This bill of exceptions should show clearly that the Court below erred; and this must be done either by stating definite law points or by stating the whole evidence of which the legal import is embraced in the decision, and in the latter case the bill should state that no other evidence was given to prove the point included in the decision. The points relied upon as grounds for reversal must appear from the bill of exceptions itself, unless the bill of exceptions show that all the evidence in the case is set out therein, the presumption is that the evidence offered justified the instructions given or the refusal to give those requested. (See Richardson *v.* Denison, 1 Aik., 210; Stearns *v.* Warner, 2 Aik., 26; Brown *v.* Brown, 7 Miss., 288; Ingram *v.* State Miss., 7 Miss., 293; Mason *v.* McCampbell, 2 Pik., 506; Trott *v.* West, 10 Yerg., 499 S. C., 1 Meigs, 163; Wilkins *v.*

Gilmore, 2 Humph., 140; Perdu *v.* State, 2 Hump., 494; Kingsley *v.* State Bank, 3 Yerg., 107; Tidd's Prac., Vol. 2, note to page 863.) But we respectfully submit that the abstract of the evidence contained in the Record in this case is sufficient to justify the Court in refusing the request of the counsel for defendant in the Court below, for while the particular objection to the evidence is not stated in the bill of exceptions, it is evident that the objection was made upon the theory that the Court erred in refusing to instruct the jury to bring in a verdict for defendant on the ground that this action could not be maintained by the personal representative of Samuel Kimbro, deceased, inasmuch as the draft was issued to Mrs. Kimbro, his wife, during coverture, and was not reduced to possession during the life of her husband, which position is fully answered in our remarks upon the first assignment of error.

The third assignment of errors: "The Court erred in refusing to submit the issue on the second plea to the jury."

This is not true as is clearly shown by the Record itself.

The fourth assignment of error is the refusal of the Court to grant the second prayer, which is as follows:

"The presumption of law is that the power of attorney in evidence, being duly attested by the clerk and seal of the Court of Davidson County, Tennessee, is a good and valid power of attorney, and the burthen of proof is on the plaintiff to show that it is invalid." This prayer was properly refused. In this request the Court is asked to assume that certain facts have been proved, which the jury alone can determine. It will appear from the evidence in the Record that the validity of the power of attorney was attacked by the plaintiff, and that the execution of it by Mrs. Kimbro was emphatically denied, and, therefore, the Court could not assume that a due attestation by the clerk, under the seal of the Court, cured the defects complained of, and was proof of the proper execution of the instrument. If a prayer for instructions be not correct in its very terms it is not error to refuse it. (See Violet *v.* Patton, 5 Cranch, 142; Brook *v.*

Marbury, 11 Wheaton, 78, (6 Curtis, 517;) Buck *v.* Chesapeake Ins. Co., 1 Peter, 151, (7 Curtis, 508;) Elliot *v.* Peirsol, *ib.*, 328, (7 Curtis, 601;) Columbia Ins. Co. *v.* Lawrence, 2 Pet., 25, (8 Curtis, p. 10;) Patterson *v.* Jenks, *ib.*, 216, (8 Curtis, 92;) Scott *v.* Ratliff, 5 Pet., 81, (9 Curtis, 235;) Winn *v.* Patterson, 9 Pet., 663, (11 Curt., 516;) Moore *v.* Bank of Metropolis, 13 Pet., 302, (13 Curt., 164;) Catts *v.* Phalen, 2 ——, 375, (15 Curt., p. 142.)

The Court is not bound to instruct the jury in the terms required by either party. It is enough that so much thereof is given as is applicable to the evidence and the merits of the case. (See Pitts *v.* Whitman, 2 S. T., 609.)

No Court is bound to repeat to the jury the same substantial proposition of law in different forms. It is enough that it be once laid down in an intelligable and unexceptionable manner. (See Kelly *v.* Morris, 6 Peter, 622, (10 Curt., 286.)

It is not error to refuse an instruction upon an abstract question. (Hamilton *v.* Russell, 1 Cranch, 310, (Curtis, 415;) Brooks *v.* Marbury, 11 Wheaton, 78, (6 Curt., 517;) White *v.* Poe, 2 How., 457, (15 Curt., 167.)

A refusal to charge upon a disputed question of fact is not error. (See Crane *v.* Morris, 10 Curtis, 274.)

It is not error to refuse an instruction which involves an opinion on matters of fact. (U. S. *v.* Burnham, 1 Mass., p 57.)

A judge is not bound to instruct a jury that they are bound to draw certain inferences from the evidence. (U. S. *v.* Jones, 8 Pet., 399; 11 Curt., 140.)

Moreover, this power of attorney, if executed at all, was executed by a married woman during coverture, without the consent or concurrence of her husband, in a State where the wife is incapable of making a contract, even as to her own property, without the concurrence of her husband; and much less could she dispose of her husband's estate without his consent, unless he had been declared insane, or of unsound mind, by a tribunal established by law, and there is no pretext here that such was the case. (See Tennessee Code, page —.)

The fourth exception is the refusal of the Court to grant the seventh prayer, which is as follows: "That if the jury believe that the credit given to the defendant by the U. S. Treasury was given on the faith of the genuineness of the signature of Mrs. Kimbro, then the plaintiff must look to the U. S. for a remedy, and cannot recover in this action."

To this we reply that it was the duty of the drawee, the defendant, to require identification of the signature of the payee if it was not fully satisfied from its own knowledge before making payment, and it makes no difference whether or not the Government look to the signature of the payee, the bank had paid the draft upon its own responsibility and charged it up to the Government in their account, and returned it cancelled and paid as a voucher to their account; the Government was not concerned in knowing the signature of the payee of the draft; it was not their province to know it; that was a duty that belonged exclusively to the drawee or acceptor.

The fifth exception is the refusal of the Court to grant the eight prayer, which is in the following language: "In the absence of other proof than that a note or draft is payable to the order of a married woman, it must be presumed that the meritorious consideration therefore sprung from herself and not from her husband, and that if the husband die without having reduced the note or draft to his possession, the absolute ownership thereof vests *eo. instanti* in the wife, payee named in the note, and when the ownership of a chose in action has vested in one person, action thereon cannot be maintained in the name of another person, nor in the name of his representative without proof of actual assignment. This is a purely hypothetical case, and even though the principle of the law laid down be correct, the Court did right in refusing the prayer, as it is not error to refuse to charge, but it is error to charge a jury on a hypothetical state of facts. See U. S. Rentling, 20 How., 252, (6 Pet., 328;) Boardman *v.* Reed & Ford's Lessee, (10 Curt., 135;) Hamilton *v.* Russell, 1 Cranch, 310, (1 Curtis, 415.)

An instruction upon a question which does not arise out of any evidence should be refused. Tucker *v.* Morland, 12 Curtis, 14.

The sixth exception is the refusal of the Court to grant the ninth prayer, which is as follows, to wit: "Unless the jury find from the evidence that the draft in question was presented to the first National Bank, and accepted by said Bank in favor of the plantiff's decedant, they must render a verdict for defendant." To this we reply that the payment of a check or draft upon a forged endorsement is equivalent to an acceptance in favor of the rightful owner. Moreover, a check payable on presentment cannot in the usual course of business be presented for acceptance. (See Story on Bill of Exchange, Sec. 451; Canal Bank *v.* Bank of Albany, 1 Hill, N. Y. R., 287; Goddard *v.* Merchants' Bank, 2 Sanford, S. C., N. Y. Reports, 247; 2 Parsons, N. & B., 71.) The doctrine is well settled that while the acceptor or drawer is not bound to pay it if the endorsement under which the holder claims is forged, and may compel the holder to prove the genuineness of the signature of the payee, yet if he does pay it, the real owner is still entitled to recover the amount as well from the holder as from the acceptor or drawer; so, in this case, the First National Bank, defendant, might have compelled the Fourth National Bank, who presented the bill for payment, to prove the genuineness of the signature of the payee before payment, but as they did not take that precaution, they paid it at their own peril, and must respond to the payee if the signature is forged or placed upon the bill without authority. The defendant paid this draft upon the strength of the endorsement of the Fourth National Bank of New York, and might have recovered the amount from that bank, and their duty was, when they found they had paid the draft upon a forged endorsement, to have paid the plaintiff and made reclamation upon the Fourth National Bank of New York.

The seventh exception is the refusal of the Court to grant the tenth prayer, which is as follows: "The defend-

ant in the payment of the draft in evidence acted as the agents of the U. S. Government, and particularly of the U. S. Treasurer, and are not liable in this action."

The relations of this defendant to the Government, so far as its deposits was concerned, were the same as existed between the defendant and any other depositor. The law gives the Government the right to designate certain banks as national depositaries, and in banks so designated the Treasurer and other disbursing officers may make deposits from time to time for the convenience of business, and the case stands the same, so far as these parties are concerned, as though a paymaster in the army or navy, or any other disbursing officer of the Government had drawn this draft. (See Currency Act June 3, 1864, 13 Statutes at Large, 113.)

The eighth exception is the refusal of the Court to grant the eleventh prayer, to wit: "If the jury, from all the evidence, find that in paying the draft in question, the defendant acted as the agent of the Treasurer of the United States, then the defendants are not liable in this action." When an agent acts without the scope of his authority and does a wrongful act, either wilfully or by culpable negligence, the act becomes his own, and his principal is not bound by it.

The ninth exception is the refusal of the Court to grant the thirteenth prayer, to wit: "If the jury find from all the proof in the case that the draft in evidence was issued to Elizabeth Kimbro during coverture and that prior to the commencement of this action her husband died without having reduced said draft to his possession, then the action cannot be maintained by the representative of the estate of her deceased husband, and the jury must return a verdict for the defendant unless they further find that intermediate, her husband's death, and the commencement of this action, she transferred the cause of action herein to the estate of her husband." To this we reply: If the draft had been the separate property of herself, (Mrs. Kimbro,) the fact that she brought an action in favor of her husband's estate to recover the proceeds for the benefit of the estate is *prima facia* evi-

dence of her intention to waive her right to it, and operates as a transfer or assignment to the subject matter of the action, and by this act she would be estopped from claiming it afterwards. A waiver may either be express or implied, and an implied waiver growing out of the circumstances of the case and the conduct of the parties is as effectual as an express waiver. (Ransom *v.* New York, 4 Blatchford, C. C. R. S. C., 20 How., 581.) Moreover, upon this question it was in proof before the jury, as appears from the Record, that this draft was the proceeds of claim against the Government of the United States, property taken for the use of the army, and that the payee of the draft was living upon the farm with her husband, and the reason why she prosecuted the claim in her own name was because her husband was an imbecile.

The tenth exception is the refusal of the Court to grant the fourteenth prayer, to wit: "Unless the jury find that Samuel Kimbro at the time the draft in evidence was issued was not of sufficiently sound mind to be capable of making a valid contract or attending to his business, the right of action in this case is barred by the Statute of Limitations, and verdict must go for the defendant." This request was made upon a disputed state of facts. The insanity of the plaintiff's decedent was one of the issues submitted to the jury, and therefore was a disputed fact. A refusal to charge upon a disputed question of fact is not error. See Marine Ins. Co. of Alexandria *v.* Tucker, 3 Cranch, 391, (1 Curtis;) Smith *v.* Carrington, 4 Cranch, 62, (2 Curtis;) Crane *v.* Morris, 6 Pet., 598. It is not error to refuse to declare the law arising not in the facts, but on the evidence. See Patterson *v.* Jenks, 2 Pet., 216, (8 Curtis, p. 92;) Providence *v.* Babcock, 3 Walles, 240. Further, the Court was right in refusing this prayer for another reason; the statute could not commence to run on the issuing of the draft; the cause of action did not accrue against the defendant in favor of the plaintiff's decedent until it had improperly paid the draft again. This is a mixed question of law and

of fact, and it would have been error in the Court to have granted the prayer. (See U. S. *v.* Carlton, 1 Gall, 400.)

The eleventh exception is the refusal of the Court to grant the 15th prayer, to wit: "If the jury find that at the date of said draft said Samuel Kimbro was of unsound mind, and if they further find that Mrs. Kimbro had right or authority to prosecute in her own name the claim in payment of which said draft was issued, then, without further evidence, it is competent for the jury to find that she had full right or authority to execute the power of attorney given in proof on the part of the defendants; and should they find she had not right or authority and that she did execute and acknowledge the said power of attorney, whether the same was in blank or not, and delivered to the firm of H. Thompkins and Co., and that one of said firm wrote her name on the back of said draft, and that, relying upon such endorsement, defendant paid the draft, the jury should find for the defendant." To this proposition we reply—1st. That if Mrs. Kimbro had right or authority to prosecute the claim in her own name, in payment of which said draft was issued, it does not follow as a legal sequence that it was competent for the jury to find that she had full right or authority to execute the power of attorney in question by which the proceeds belonging to her husband could be transferred to another. See Act of Congress July 20, 1846, Sec. 1, U. S. Stat. at Large, Vol. 9, p. 41. See also act Feb. 26, 1853, U. S. Stats. at Large, Vol. 10, p. 170.

2d. The power of attorney could not aid them, even though it had been properly executed, and obtained fairly in the ordinary course of business, (which is not the case,) because it is in evidence, and admitted that no power of attorney accompanied the draft when it was paid, and the defendant did not know of its existence.

Byles on Bills, page 45 and 32–43; Stackpole *vs.* Arnold, 11 Mass., pp. 27, 29; 16 Pick., pp. 347, 350; 12 Mass., pp. 173, 175; 22 Pick., pp. 158–161; 7 Wend., p. 68; 10 Wend., pp. 87, 271; Story on Agency, p. 147 and note 4; Collyer

on Part., 365 and note 1; Story on Agency, 149 and note 2: Story on Agency, p. 154.

Com. Dig. Attorney, 6, 11, 14, 15; Story, p. 155 and 42, 157, 160 a page 204–5; Story, pp. 165, 170, 172, 199, 209, 166, 126, note 4, 133, and note 2, 430, 437.

This is in the nature of an equitable action, and lies to recover money in the hands of the defendant, which he in good conscience ought not to retain. No stronger case could be presented to a court than this. It is admitted by the defendant that the plaintiff is not at fault. She has not received the money due her from the drawee of this draft. The defendant has got it, and has not paid it to any person authorized to receive it; if he has paid it, through his own carelessness to the wrong party, he alone must suffer.

The defendant has received the money from the drawer of the bill, and should pay it to the plaintiff.

J. DANIELS
and
SHELLABARGER & WILSON,
Attorneys for Defendant in Error.

UNITED STATES EX. REL.

JOHN R. FLIPPIN, et. al.,

—vs.—

CONNALLY F. TRIGG.

Petition for Writ of Mandamus.

THE UNITED STATES EX. REL.
JOHN R. FLIPPIN, ET. AL.

vs.

CONNALLY F. TRIGG.

To the Honorable Supreme Court of the United States:

Your petiitoners, John R. Flippin, W. A. McCloy, James Elder, John Zent, S. W. Green, H. G. Dent, W. O. Harvey, W. N. Brown, J. W. Cochran, L. D. Grant, Thos. Fleming, P. J. Kelly, John W. Kearn, John Donovan, John M. Rourke, Thos. Boyle, James Speed, J. T. Blaise, H. M. Neely, Richard Dougherty, E. Hardin, Jacob Weller, Thos. J. Beasley, W. H. Bates, R. C. Williamson, R. B. Denson, H. Seesel, E. J. Karr, W. B. Glisson, A. B. Morrison, and George Hutchinson, respectfully state and show to the Court, as follows:

On the 22d day of March, 1875, one Talmadge E. Brown filed a petition on the law side of the Circuit Court of the United States for the District of West Tennessee, in the name of the United States, himself as relator, against the city of Memphis, John Loague, Mayor; Owen Dwyer, C. W. Metcalf, Nick. Malatesta, H. G. Dent, J. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti and S. B. Robbins, constituting the Board of Aldermen, and P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, Jr., Richard Dougherty, Wm. Gay, Chas. G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Moon, T. A. Ryan and John Zent, constituting the Common Council of the city of Memphis, and together comprising the General Council of said city.

Said T. E. Brown, in and by his said petition alleged that on the 16th day of March, 1875, he had on the equity side of said Circuit Court, recovered a decree against the city of

tory writ of mandamus, in accordance with said judgment, to be served on the city of Memphis and its Mayor and General Council, in the manner prescribed by law.

Petitioners further show unto your Honors, that on the 24th day of May, 1876, the Clerk of said Circuit Court, issued a peremptory writ of mandamus, addressed to the City of Memphis, and John R. Flippin and others hereinabove named as your petitioners, and commanding your petitioners, who together constitute the Mayor and General Council of said city, to assess, levy and collect, for the year 1876, a tax in addition to all other taxes allowed by law to be collected, sufficient in amount to realize the sum of $125.000, and to pay the same over to said relator, T. E. Brown. On the 7th day of June, 1876, said last mentioned writ was served on your petitioners. Petitioners further state that your petitioner, John R. Flippin, is the Mayor, and your petitioners, W. A. McCloy and others hereinbefore named, together compose the General Council of said city, and that they came into office as such on the 15th day of January, 1876.

On the 27th day of November, 1876, being one of the days of the regular November term of said court, your petitioners moved to set aside and quash said writ because,—

1. It commanded your petitioners peremptorily to do an act, they having had no day in Court, or opportunity to be heard on the question whether they should be so commanded.

2. Said writ was issued in a cause to which your petitioners were not parties. Nor were they in privity with said parties against whom the peremptory writ of mandamus was awarded by the said judgment of March 30th, 1875.

3. The said writ, addressed to your petitioners, was wholly unwarranted by the said judgment of March 30th, 1875,

under which said judgment, and none other, the said writ was issued.

4. If the writ directed to your petitioners was warranted by the judgment, the judgment to that extent was null and void.

On the 14th day of December, 1876, the motion of your petitioners to set aside and quash said writ was heard before the Honorable Connally F. Trigg, Judge of the said Circuit Court of the United States for the District of West Tennessee, who, after argument by counsel and consideration of the same, was pleased to and did overrule said motion, and refuse to quash said writ.

Your petitioners, upon the refusal of the Court as aforesaid, to set aside and quash said writ, tendered a bill of exceptions to the action and rulings of the Court, which said bill of exceptions was on the 3d day of January, 1877, signed, sealed, and made part of the record of said cause. Said bill of exceptions sets forth truly and accurately all the evidence introduced by either party on the hearing of said motion, and the rulings and final judgment of the Court. Petitioners file herewith and as part of this petition, a full and true copy of said bill of exceptions, marked "Exhibit A to Petition of John R. Flippin et al."

Petitioners further show that, by proceedings against them for a contempt of Court in failing to obey said writ, they are being compelled to obey the same, notwithstanding they are advised that they could present good and sufficient reasons why they should not be compelled to levy said tax, if they were allowed a day in Court and an opportunity to do so.

Your petitioners are advised that because said writ was unwarranted by any judgment of said Court, valid and binding upon them, and upon the other grounds herein set forth,

they were entitled to have the same set aside and quashed. They are advised that they are without remedy to enforce their right to have said writ quashed, other than by the writ of mandamus to be issued out of this honorable Court, commanding and directing said Connally F. Trigg, Judge of said Circuit Court, to set aside and quash said writ.

Petitioners therefore pray that a rule may be entered in this honorable Court, requiring said Connally F. Trigg, Judge of said Circuit Court, to appear, in person or by counsel, on a day to be named by your Honors, and show cause why a writ of mandamus should not be awarded and issued by this Court, directing and requiring him, as Judge of said Circuit Court, to set aside and quash the said writ; and that finally a peremptory writ of mandamus may be awarded, ordering and requiring the said writ to be set aside and quashed.

And as in duty bound, petitioners will ever pray, &c.

S. P. WALKER,
Attorney for Petitioners.

On this 3d day of January, 1876, personally appeared before me, S. S. Garrett, a Commissioner of the United States, in and for the District of West Tennessee, John R. Flippin, and made oath in due form of law, that the foregoing petition is true, to the best of his knowledge, information and belief.

J. R. FLIPPIN.

{SEAL.} Subscribed and sworn to before me, the day and year first above written.

S. S. GARRETT,
U. S. Com., W. D. T.

Exhibit A, to Petition of John R. Flippin et al.

THE UNITED STATES EX. REL. T. E. BROWN, vs. THE CITY OF MEMPHIS, JOHN LOAGUE, Mayor, et al.	CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST TENNESSEE. Law Docket No. 1874½.

BILL OF EXCEPTIONS.

On the 27th day of November, 1876, John R. Flippin, W. A. McCloy, James Elder, John Zent, S. W. Green, H. G. Dent, W. O. Harvey, W. N. Brown, J. W. Cochran, L. D. Grant, Thomas Fleming, P. J. Kelly, John W. Kearns, John Donovan, John M. Rourke, Thos. Boyle, James Speed, J. F. Blaise, H. M. Neely, Richard Dougherty, E. Hardin, Jacob Weller, Thos. J. Beasley, W. H. Bates, R. C. Williamson, R. B. Denson, H. Seessel, E. J. Karr, W. B. Glisson, A. B. Morrison and George Hutchinson, appeared in open Court, and moved to set aside and quash a certain writ of mandamus, which said writ is in words and figures following, to-wit:

In the Circuit Court of the United States of America in and for the Sixth Judicial Circuit thereof, and District of West Tennessee.

THE UNITED STATES OF AMERICA EX. REL. TALMADGE E. BROWN,
vs.
THE CITY OF MEMPHIS AND THE GENERAL COUNCIL OF THE CITY OF MEMPHIS. } 1874½.

The President of the United States: To the city of Memphis, John R. Flippin, Mayor, W. A. McCloy, Jas. Elder, John Zent, S. W. Green, H. G. Dent, W. O. Harvey, W. N. Brown, J. W. Cochran, L. D. Grant and Thomas Fleming, Aldermen; P. J. Kelly, John W. Kearns, John Donovan, Jno. M. Rourke, Thomas Boyle, Jas. Speed, J. T. Blaise, H. M. Neely, Richard Dougherty, E. Harden, Jacob Weller, Thomas J. Beasley, W. H. Bates, R. C. Williamson, R. B. Denson, H. Seessel, E. J. Karr, W. B. Glisson, A. B. Morrison and George Hutchinson, Councilmen, constituting the General Council of the city of Memphis, GREETING:

Whereas, it appearing that on the 30th day of March, A. D., 1875, in this, the Circuit of the United States for said District of West Tennessee in the cause of T. E. Brown vs. the city of Memphis, came on to be heard on the demurrer of the plaintiff to the return of the defendants to the alternative writ of mandamus herein issued, and it appearing to the Court that the said return presented no good cause for not complying with the requirements of the said alternative writ, and that the said demurrer is well taken. It was ordered that the demurrer be sustained and the said defendants saying nothing further in bar or preclusion of the remedy sought by the plaintiff, and it appearing to the Court that on the 16th day of March, A. D., 1865, Talmadge E. Brown recovered on the equity side of the Court here, of the

city of Memphis, the sum of two hundred and ninety-two thousand one hundred and thirty-three 47-100 dollars and the costs of this suit and that an execution has been issued on the said decree and has been returned with a return of the Marshal endorsed thereon, to the effect that the city of Memphis has no property whereon to levy and that the execution is returned wholly unsatified, and it further appearing that the said city has no money wherewith to pay the said decree and no property out of which it can be made, and no means of paying the said decree except by levying a tax specially for that purpose, and that it possesses the power to levy and collect such a tax, and that, though often requested to do so, the city of Memphis has wholly failed to pay the said decree or to levy or collect a tax for the purpose of paying the same. It was therefore considered, ordered and adjudged that the alternative writ of mandamus be made peremptory and final and that the city of Memphis and its General Council proceed each year for the ensuing three (3) years to-wit: 1875, 1876 and 1877, respectively, at the same time and in the same manner as the other city taxes are assessed, levied and collected, to assess, levy and collect upon all the property within the city, taxable by law, a tax in addition to all other taxes allowed by law, in lawful money of the United States of America, sufficient in amount after making due allowances for all delinquencies, insolvencies and defaults to realize one hundred and twenty-five thousand dollars ($125,000) each year for the years 1875 and 1876 respectively and as much of said sum for the remaining year, to-wit: 1877 as may be required or necessary to pay and satisfy the balance of the said decree, including interests and costs not satisfied by the taxes collected and paid over during the two preceding years, and to pay over the same as fast as, and from time to time, as the same may be collected, directly to the said Talmadge E. Brown, or in Court here to be forthwith paid him without further order of the Court until the whole amount of the said decree, including the costs of the suit and the interest that has accrued, or may accrue thereon, be paid and discharged. Now, further, this is to command you

the said city of Memphis and you the Mayor, and you the said members of the Board of Aldermen and Common Council and General Council, that in accordance with said decree, you proceed to assess, levy and collect for the year 1876, a tax upon all taxable property of the city of Memphis, in addition to all other taxes allowed by law, sufficient in amount after making due allowance for delinquencies, insolvencies and defaults to realize one hundred and twenty-five thousand dollars ($125,000) and pay over the same in accordance with the above recited decree of this Court, and that you make due return of this writ on the 4th Monday of November next.

WITNESS, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court this 24th day of June, A. D., 1876.

{SEAL}

H. E. ANDREWS, Clerk.
L. H. PILLSBURY, D. C.

Endorsed:

No. 1874½.

CIRCUIT COURT OF THE UNITED STATES,

WESTERN DISTRICT OF TENNESSEE.

T. E. BROWN
vs.
CITY OF MEMPHIS. } Alternative Writ of Mandamus.

Issued May 24th, 1874.

H. E. ANDREWS, Clerk.
L. H. PILLSBURY, D. C.

THE UNITED STATES OF AMERICA,

SIXTH CIRCUIT AND DISTRICT OF WEST TENNESSSEE.

I, HORACE E. ANDREWS, Clerk of the Circuit Court of the United States for said District of West Tennessee, do hereby certify that the paper hereto attached is a full, true and

perfect copy of the original Alternative Writ of Mandamus in said Court, as the same now appears of record and upon the files in my office, in the following cause, to-wit:

Talmadge E. Brown vs. The City of Memphis.

IN TESTIMONY WHEREOF, I have hereunto set my name and affixed the seal of said Court, at office in the city of Memphis, this 24th day of May, A. D. 1876, and of the Independence of the United States the one hundredth year.

{SEAL}

H. E. ANDREWS, Clerk.
L. H. PILLSBURY, D. C.

On the 7th day of June, 1876, I executed this Writ, by tendering the reading of the Original Writ of Alternative Mandamus, of which this is a true copy, to the Board of Aldermen and the Common Council of the city of Memphis, both said Boards being then and there in session, which said reading was waived by said Boards and service of said Writ accepted, and on said date I personally served on J. R. Flippin, as Mayor of the city of Memphis, the Original Writ of Alternative Mandamus, of which this is a true copy.

L. B. EATON, U. S. Marshal.
By W. KOCH, Dep.

On the trial of this motion, the said John R. Flippin and others above named, read the record and proceedings of the above entitled cause, wherein the United States on the relation of T. E. Brown is the plaintiff, and the city of Memphis, John Loague, J. R. Robbins, Owen Dwyer, C. W. Metcalf, Nich. Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti, John Zent, P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, Jr., Rich'd Dougherty, Wm. Gay, Chas. G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Mhoon and T. A. Ryan, together constituting the Mayor and General Council of said city, are defendants, which said record and proceedings are in words and figures following, to-wit:

THE CITY OF MEMPHIS
vs.
TALMADGE E. BROWN,
AND
TALMADGE E. BROWN
vs.
THE CITY OF MEMPHIS.

CROSS BILL.

Now comes the said Talmadge E. Brown, plaintiff in the Cross Bill in this case, in person, "Friday, March 12th, 1875," and on this 12th day of March, A. D. 1875, files in open Court the mandate of the Supreme Court of the United States in this cause, and the same is ordered by the Court to be spread upon the Record of this Court, in the words and figures following, to-wit:

UNITED STATES OF AMERICA, SS.

The President of the United States of America: To the Honorable the Judges of the Circuit Court of the United States for the Western District of Tennessee, GREETING:

Whereas, lately in the Circuit Court of the United States for the Western District of Tennessee, before you or some of you, in a cause between the city of Memphis, complainant, and Talmadge E. Brown, surviving partner of the late firm of T. E. Brown & Co., defendant (in bill), and Talmadge E. Brown, surviving partner of the late firm of T. E. Brown & Co., complainant, and the city of Memphis defendant (in cross bill), wherein the decree of the said Circuit Court entered in said cause is in the following words, to-wit:

"In this cause, at a prior day of this term, the Court having delivered an opinion upon the matters involved herein, after the argument thereof by counsel and the submission thereof to the Court at a prior term of this Court, the cause came on to be further heard at this term upon exceptions to

the Master's report, and upon the proof on file. And it appearing to the Court that the exceptions to the report are not well taken, the same are hereby severally overruled and the report of the Master is confirmed, except as to the item of one hundred and fifteen thousand two hundred and sixteen dollars ($115,216) damages suffered by failure to provide a sinking fund; and as to the said item, the Court on application of the city of Memphis, allowed further proof to be taken, and under such permission the depositions of I. B. Kirtland, William M. Farrington, H. E. Garth, J. J. Freeman, L. Levy, J. J. Murphy and F. H. Cossitt, on the part of the city of Memphis, and of F. S. Davis, W. W. Thatcher, E. D. Cobb, T. R Farnsworth, B. Richards, W. C. McClure, N. B. Forrest, J. W. Page, Jr., John Ainslie and E. M. Apperson, on the part of Talmadge E. Brown, now taken and filed, and the cause coming on for further consideration on such testimony and the further consideration of the other testimony in the case, and the said report, and was argued by counsel, and thereupon upon consideration thereof it was ordered, adjudged and decreed as follows, viz.: That the said sum of one hundred and fifteen thousand two hundred and sixteen dollars in said report be not allowed, but that instead thereof there be allowed the sum of eighty-nine thousand eight hundred and eight dollars, and as so modified said report stands confirmed. And further, that the relief prayed in the bill of complaint of the city of Memphis, as to all matters not embraced in the accounting before the Master and determined in the confirmation thereof, and that Talmadge E. Brown ought to have and receive of and from the city of Memphis, under the cross bill herein, the sum of four hundred and seventy-one thousand and sixteen dollars and sixty-four cents, being the balance found due by the Master's report as hereby modified, together with interest thereon from the first day of August, 1871, the date of the Master's report, to-wit: the sum of seventeen thousand and nine hundred and seventy-seven dollars and eight cents, making a total, principal and interest, of four hundred and eighty thousand nine hundred and ninety-three dollars, which sum of money

the city of Memphis ought forthwith to pay to said Talmadge E. Brown. And further, that said Talmadge E. Brown have and recover of and from the city of Memphis the said sum of four hundred and eighty-eight thousand nine hundred and ninety-three dollars ($488,993), with costs to be taxed by the Clerk, and this judgment and decree shall bear interest of six per cent. per annum. And further, that there shall be taxed in the costs against the city of Memphis for A. S. Mitchell, Esq., the Master herein, the sum of fourteen hundred and twenty dollars; and further, that execution shall issue for the enforcement of this decree and judgment as upon judgments at law," as by the inspection of the transcript of the record of the said Circuit Court which was brought into the Supreme Court of the United States by virtue of an appeal taken by the city of Memphis, agreeable to the Act of Congress in such case made and provided, fully and at large appears.

And whereas, at the present term of October, in the year of our Lord one thousand eight hundred and seventy-three, the said cause came on to be heard before the said Supreme Court, on the said transcript of record, and was argued by counsel:

In consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court in this cause be and the same is hereby reversed with costs; and that the said city of Memphis recover against the said Talmadge E. Brown five hundred and sixty-eight dollars and eighty-seven cents, for its costs herein expended, and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the said Circuit Court, with directions to enter a decree in conformity with the opinion of this Court.

6th April, 1874.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause in conformity to the opinion and decree of this Court, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

WITNESS The Hon. Morrison R. Waite, Chief Justice of said Supreme Court, the eighth day of March, in the year of our Lord one thousand eight hundred and seventy-five.

Costs of the city of Memphis: Clerk, - - $548 87
Attorney, - - 20 00

Taxed by D. W. Middleton, Clerk of the Supreme Court of the United States.

Endorsed:

No. 226—October Term, 1873.

MANDATE.

SUPREME COURT UNITED STATES.

MEMPHIS vs. BROWN.

Filed March 12th, 1875. H. E. ANDREWS, Clerk.

ORDER OF COURT.

THE CITY OF MEMPHIS
vs.
TALMADGE E. BROWN. } Bill and Cross Bill.

In this cause the city of Memphis appears by its acting attorney, G. A. Hanson, Esq., and Talmadge E. Brown, by his attorney, S. Sibley, Esq., and the cause is brought on for final decree, in accordance with the mandate, judgment and opinion of the Supreme Court of the United States in this cause rendered at the October term thereof, A. D. 1873, when the decree of this Court hereinbefore rendered on the 19th day of March, A. D. 1872, was declared in all things correct, except as to the three items, part of the amount of such decree, and aggregating the sum of one hundred and twenty-four thousand eight hundred and eight dollars ($124,808), which items were disallowed by said Supreme Court, and to discharge the decree of this Court thereof, the same was reversed and remanded to this Court for these further proceedings.

And it now further appearing that the city of Memphis has since the rendition of the decree paid to said Brown

thereon, the sum of one hundred and thirty thousand two hundred and ninety-two dollars and sixty-nine cents ($130,292.69) in divers partial payments and that there yet remains due from the city of Memphis to Talmadge E. Brown, after deducting said payments, amounting to one hundred and thirty thousand two hundred and ninety-two dollars and sixty-nine cents ($130,292.69,) and after striking out the sum of one hundred and twenty-four thousand, eight hundred and eight dollars as decreed by the said Supreme Court and all interest thereon, allowed in the former decree of this Court, the sum of two hundred and ninety-two thousand, one hundred and thirty-three dollars and forty-seven cents ($292,133.47).

It is therefore ordered and decreed that the city of Memphis do forthwith pay to said Talmadge E. Brown, directly, or to the Register of this Court, for him, the said sum of two hundred and ninety-two thousand, one hundred and thirty-three dollars and forty-seven cents ($292,133.47) together with interest thereon till paid at the rate of six per cent. per annum.

And it is ordered and decreed that said Talmadge E. Brown have and recover from the city of Memphis the aforesaid sum of two hundred and ninety-two thousand, one hundred and thirty-three dollars and forty-seven cents ($292,133.47), together with the costs of this suit to be taxed and that this judgment and decree bear interest at the rate of six per cent. per annum till paid as aforesaid, and that execution therefor forthwith issue.

ORDER FOR MANDAMUS,

Issued March 22, 1875.

UNITED STATES EX REL. TALMADGE E. BROWN, vs. THE CITY OF MEMPHIS, JOHN LOAGUE, Mayor, and S. B. ROBBINS, et al., Members of the City Council.	Order for Mandamus.

In consideration of the petition which is now filed, it is ordered that the Clerk issue an alternative writ of mandamus as therein prayed for, and in conformity to the decree heretofore rendered in this cause, to wit, on the 17th day of March, 1875, making the same returnable in Court here on Friday, the 26th day of March, A. D. 1875, at 10 o'clock, A. M.

PETITION FOR MANDAMUS,

Filed March 22d, 1875. H. E. ANDREWS, Clerk.

THE UNITED STATES on the relation of T. E. BROWN, vs. THE CITY OF MEMPHIS.	United States Circuit Court— District of West Tennessee.

To the Honorable Judge of said Court:

Your petitioner represents and shows to the Court that in the year A. D., 1867, the city of Memphis under the provisions of an act of the Legislature of the State of Tennessee, contracted with the firm of Taylor, McBean & Co., (made up of Abner Taylor, A. J. McBean and Alexander McBean); also contracted with the firm of Forrest, Mitchell & Co., for the paving certain of its streets with what is known as Nicolson pavement and undertook to charge the cost thereof

to the owners of the abutting property, proportioning the same according to the frontage of each lot and to require that the owners of the same should pay such cost as debts contracted by themselves.

Petitioner further alleges that said parties entered upon the said work under said contract and completed portions of the same, and that subsequently in the year 1868 the firm of T. E. Brown & Co., (composed of T. E. Brown and J. Langden) succeeded to all the rights of all of said contracting parties, with the city of Memphis and completed the same fully and to the entire satisfaction of said city, and the same was thereupon accepted by the city.

Petitioner further alleges that the property owners paid a part of the cost of said work, but a great many of them refused to pay, and a large amount being due and unpaid, bills were filed for the recovery of the same in the Court of Chancery, as contemplated by the said act of the Legislature and decrees were thereon rendered and the cases were taken to the Supreme Court of Tennessee, wherein, upon final hearing, it was decided that the city had no power to make the abutting property owners pay the costs of said work, and discharged the said owners from the payment of said liabilities.

And petitioner alleges that he as surviving partner brought suit on said contracts against said city in this Court for the unpaid portions of said work, and that such proceedings were had that a decree was rendered by this Court in his favor against said city on the —— day of March, 1872, for a balance of $488,993, besides costs.

The cause was taken by appeal to the United States Supreme Court and there the decree of this Court was pronounced correct except in certain particulars, and the cause was remanded to this Court, with instructions to render a decree in favor of petitioner in accordance with the opinion of that Court.

And on the 16th day of March, 1875, in pursuance of the said mandate a decree was rendered in this Court in favor of said Talmadge E. Brown and against the city of Memphis in

the sum of $292,133.47 and the costs of the suit, and that execution issue therefor instanter.

Petitioner alleges an execution has issued on the said decree and has been returned no property found out of which to make said judgment. And the city has no money with which to pay the same and no property out of which it can be made, all of its property being exempt from execution and sale thereunder. And the city has no means with which to pay the said judgments save and except by levying a tax upon all of the taxable persons and property within its limits for this purpose.

Plaintiff alleges that in addition to the city's other powers of taxation the Legislature of the State of Tennessee, on the 18th day of March, 1873, by an act then passed, enacted among other things as follows, to-wit: "An Act to amend the charter of all the incorporated towns and cities in the State."

"Section 1st. Be it enacted by the General Assembly of "the State of Tennessee, That where, any incorporated town "or city has, by virtue of presumed authority to levy special "assessments for specific purposes, levied and collected taxes "or special assessments the right to make, which levy and "assessment was afterwards declared void by the Supreme "Court of the State, said town or city shall have the power to "levy a tax in addition to all other taxes allowed by law to be "levied sufficient to cover the entire cost of the improvements "with interest thereon for which said special assessments were "illegally made, &c., &c."

And petitioner avers that the debt so due him as appears by the said decree accrued in manner contemplated by the said act. That is to say, the same was incurred by the city of Memphis as a part of the entire cost of paving portions of the public streets of the city, which paving was done under contracts made in pursuance of ordinances of the city, and Acts of the Legislature of the State whereby the city undertook and assumed to levy and collect from the property abutting the streets on which the paving was done the cost thereof, and after the said paving was done and accepted as

herein before stated and before the said 18th day of March, 1873, the Supreme Court of the State of Tennessee decided that no right or power to make the said levy or assessment existed, and that the attempt to make the same was void. For particularity as to all the matters herein stated, the petitioner refers to the record and proceedings in the said cause, in which he recovered the said decree now on file in this Court and prays the same may be considered as a part of this, his petition.

Petitioner alleges that he is a citizen of the State of Iowa and that the respondent is a citizen of the State of Tennessee.

Plaintiff says that notwithstanding said act of the Legislature and the respondents general powers of taxation, and the fact that plaintiff has frequently demanded the payment of his said debt, and the levy of a tax sufficient in amount to pay his said decree, the city has failed either to pay the same or to levy a tax sufficient for this purpose, and neglects and refuses to do so.

Plaintiff alleges that the Hon. John Loague is the Mayor of Memphis and the following named persons constitute the General Council of the city of Memphis.

BOARD OF COUNCILMEN.

P. J. Kelly,	Chas. G. Fisher,
Herman Caro,	J. S. Carpenter,
Wm. Hewitt,	L. Solari,
S. J. Camp,	J. W. Moores,
Alf. G. Tuther,	J. W. Cochran,
S. W. Green,	J. D. Danbury,
H. Luhrman,	L. D. Grant,
Jos. Clouston, Jr.,	Jacob Mhoon,
Richard Dougherty,	T. A. Ryan,
Wm. Gay,	John Zent.

BOARD OF ALDERMEN.

Owen Dwyer,	J. T. Hillsman,
C. W. Metcalf,	A. J. White,
Nick. Malatesta,	M. J. Doyle,
H. G. Dent,	G. A. Morti,
I. Happek,	S. B. Robbins.

In consideration of the promises the petitioner prays that an alternative writ of mandamus issue returnable on the 26th day of March, 1875, requiring the city of Memphis and its said Mayor and General Council to pay immediately to petitioner the amount due on said decree including interests and costs or in default thereof to levy each year for the ensuing three years, to-wit: 1875, 1876 and 1877, a tax in addition to all other taxes sufficient in amount after making due allowance and for all delinquencies, insolvencies and defaults to realize $125,000 each year and to pay over the same to said Talmadge E. Brown as fast as collected, or so much thereof as may be necessary for the purpose of satisfying this decree or show cause to the contrary and for such further other and different order in the premises as to this Honorable Court may seem fit and proper and your petitioner will ever pray, &c.

T. E. BROWN, in person.

SHELBY COUNTY,
STATE OF TENNESSEE.

T. E. Brown, the relator in the foregoing entitled action being duly sworn before the undersigned, deposes and says that the allegations in the petition are true as he verily believes.

T. E. BROWN.

Subscribed and sworn to before me, this 22d day of March, 1875.

LEONARD H. PILLSBURY,
U. S. Commissioner, D. W. T.

The Clerk will issue writ of mandamus (alternative) as prayed for in the foregoing petition, returnable on the 25th day of March, 1875, at 10 o'clock, A. M.

March 22d, 1875.

UNITED STATES OF AMERICA,
DISTRICT OF WEST TENNESSEE.

The President of the United States: To the city of Memphis, John Loague, Mayor, Owen Dwyer, C. W. Metcalf, Nick. Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti and S. B. Robbins, constituting the Board of Aldermen, and P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, Jr., Richard Dougherty, Wm. Gay, Chas. G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Mhoon, T. A. Ryan and John Zent, constituting the Common Council of the city of Memphis, and together composing the General Council of said city—GREETING:

Whereas, by a petition duly sworn to, filed in Court here, it appears that on the 16th day of March, 1875, Talmadge E. Brown recovered in this Court, on the equity side, of the city of Memphis, the sum of two hundred and ninety-two thousand one hundred and thirty-three dollars and forty-seven cents ($292,133.47), and the costs of the suit, and that execution was ordered forthwith to issue therefor; and that the said execution has been duly issued, and has been returned with the return of the Marshal endorsed thereon: "After diligent search no property found, returned without being further satisfied, by order of attorney for plaintiff;" and it appearing that the said city has no money with which to pay the said decree, and no property out of which it can be made, and has no means of paying the said decree except by levying a tax upon all the taxable persons and property within the city; and that the debt for which the said decree was so pronounced accrued and became due from the city of Memphis as a part of the entire cost of paving portions of the public streets of the city of Memphis, which paving was done under contracts made by the city, in pursuance of ordinances of the city and Acts of the Legislature of the State of Tennessee, whereby the city undertook and assumed to levy and collect from the property abutting the streets in which the

paving was done, the cost thereof, apportioning the same according to the frontage of the property on the streets paved; and after the said paving was done and accepted, and portions of the assessments levied for the payment of the cost thereof had been collected, and whilst a large balance of the cost thereof remained due and unpaid, and before the 18th day of March, 1873, the Supreme Court of the State of Tennessee decided that no right or power to make the said levy or assessment to pay for the said cost of the said pavement existed by law, and that the attempt to do so was void; and that by the Act of the Legislature of the State of Tennessee, passed on the 18th day of March, 1873, entitled "An Act to amend the charters of all the incorporated towns and cities in the State," as well as by other laws, full power and authority is given to the General Council of the City of Memphis to levy and collect a tax in addition to all other taxes authorized by law to be levied, and sufficient in amount for the sole and exclusive purpose of paying the entire cost of the said pavement so laid down, including the amount of the said decree; and that the city of Memphis and its General Council, though often requested so to do, has wholly failed to levy the tax to pay the said decree, or any part thereof, or otherwise to pay the same.

Now, therefore, this is to command you, the city of Memphis, and you the Mayor, and you the said members of the Board of Aldermen and Common Council and General Council, that you pay immediately in accordance with a decree of this Court, entered herein on the 16th day of March, 1875, the amount of the decree aforesaid, and the interest thereon and the costs of the suit; or in default thereof, that you proceed to levy and collect each year for the ensuing three years, to-wit, 1875, 1876 and 1877, respectively, a tax in addition to all other taxes, sufficient in amount, after making due allowance for all delinquencies, insolvencies and defaults, to realize one hundred and twenty-five thousand (125,000) dollars each year, and to pay over the same in accordance with the decree of this Court, entered herein March 16th, 1875, as fast as collected, or as much thereof as may be necessary for the

purpose of satisfying the said decree, including the interest thereon and the costs, or appear in Court here at 10 o'clock, A. M., on Friday, the 26th day of March, 1875, and show cause, if any you have, why you should not be required by the judgment of this Court to do so.

And this you shall in no wise omit, and do you then and there make due return of this writ.

WITNESS, Hon. Morrison R. Waite, Chief Justice of the United States, and the seal of the Circuit Court aforesaid, and the signature of the Clerk, this 22d day of March, 1875.

{SEAL}

Signed, H. E. ANDREWS, Clerk.

A true copy.

L. B. EATON, U. S. M.

Return.

Executed by delivering the original writ, of which this is a true copy, to his Honor, John Loague, the Mayor of the city of Memphis, and by making known the contents and delivering a copy of the original writ hereof to Owen Dwyer, C. W. Metcalf, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti and L. B. Robbins, members of the Board of Aldermen of the city of Memphis, and in like manner to P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, Jr., Rich'd Dougherty, Wm. Gay, Chas. G. Fisher, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Mhoon, T. A. Ryan and John Zent, members of the Common Council of the city of Memphis, all on March 24th, 1875. After diligent search, Nich. Malatesta, Alderman, and J. S. Carpenter, Councilman, not being found, I executed this writ upon them by leaving copies hereof at the last place of residence of each of the last two on March 25th, 1875.

L. B. EATON, U. S. M.

W. KOCH, D. U. S. M.

ANSWER OF CITY.

Endorsed: Filed March 26th, 1875.

H. E. ANDREWS, Clerk.

TALMADGE E. BROWN,
vs.
THE CITY OF MEMPHIS, JOHN LOAGUE, Mayor, OWEN DWYER, et al., composing General Council.

Now comes John Loague, Mayor, Owen Dwyer, C. W. Metcalf, Nick Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti and S. B. Robbins, of the Board of Aldermen and P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Lurhman, Jos. Clouston, Jr., Richard Dougherty, Wm. Gay, Charles G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Mhoon, T. A. Ryan and John Zent, of the Board of Councilmen, and altogether composing the General Council of the city of Memphis, and make return to the writ of *mandamus nisi* issued out of this Honorable Court and not having obeyed the same, they respectfully show the following reasons or causes why they have not done so.

First, there is no money in the treasury and the General Council, of the city of Memphis, has no power under the charter of said city to levy a greater tax than one per cent., or one dollar on the $100 of taxable property for all the purposes of government, including officers salaries, police, fire, health and hospital departments, and the other current expenses of the city government, including the repair and improvement of streets, alleys, wharfs, &c., &c.

They have power to levy other taxes, as follows:

2 mills per cent. for interest on bonded debt of city.

2½ mills per cent. for sinking fund to retire the bonds of the city.

1 mill per cent. for schools and

½ mill per cent. for judgments.

But the last named special taxes are required by law to be strictly applied for the purpose for which they are allowed to be levied, and therefore they could not be applied to relator's claim. It is also made a misdemeanor for the respondents to apply said funds for any other than the purposes named by the law.

The one per cent. which respondents are allowed to levy for general purposes they have already imposed, and therefore have exhausted their powers of taxation.

The Act passed by the Legislature of Tennessee, March 18th, 1873, has since been repealed and is not now the law of the State.

Respondents cannot now give the date of the Act referred to in relator's petition, but it was passed at the present term of the Legislature though not yet published.

Second, that the writ commands these respondents to levy a tax sufficient to raise $125,000 each year for the three years, to-wit, the years 1875, 1876 and 1877, after making due allowances for all delinquencies, insolvencies and defaults, when in fact and in law the property of one citizen cannot be taxed for the delinquency of any other citizen; and furthermore, the decree in relator's favor is only $292,133.47, and the sum commanded by the writ to be raised is $375,000, or an excess of $83,133.47.

Third, by a mandate of this Court issued the day of June, 1873, the General Council of the city of Memphis levied a tax of seven mills per cent. for the year 1873, and a tax of three mills per cent., for the year 1874, in favor of relators and there is an uncollected balance on said levies of $170,000 all of which is an account of the relator's decree or claim now sought to be enforced and which is being collected and paid over to him as fast as possible. There has been collected and paid over to him from said levies about $132,742.69 all on account of his said claim, and if respondents are required

now to re-levy this same burdensome tax on those who have paid, it will be doing a great injury to the prompt taxpayer and will operate as an inducement to taxpayers to resist the payment of the tax.

Fourth, by the provisions of the law governing the city of Memphis, there are certain wards, to-wit: the Ninth and Tenth Wards, generally denominated as "the new limits" which are exempted from the payment of any tax to pay for certain indebtedness of the city, and the writ does not show whether this indebtedness is one of the exempted classes or not; and the determination of this question is a judicial one which respondents cannot safely decide for themselves and should be determined upon the face of the writ.

Wherefore the respondents say they have not obeyed the writ and they pray judgment whether they can do so upon the facts above stated.

G. A. HANSON, City Attorney.

Fifth, when the contract was made for the laying of said pavements by which the aforesaid debt became due to the relator it was understood and stipulated that the owners of the abutting property should pay for the pavement in front of each lot.

And many persons paid for such pavement according to the terms of the contract and when the act recited in relator's petition of March 18th, 1873, was passed, it provided that such persons as had paid for the pavement and held receipts therefor might be excused, or released from paying the tax levied to pay for said pavement, wherefore respondents say they cannot levy and collect from all persons subject to pay taxes, the tax as commanded by the writ and therefore they cannot obey the writ.

Wherefore they pray judgment, &c.

G. A. HANSON, City Attorney.

John Loague, Mayor, makes oath that the foregoing return is true to the best of his knowledge and belief.

JOHN LOAGUE, Mayor.

Subscribed and sworn to before me this 26th day of March, 1875.

JAMES REILLY, Clerk,
by C. REILLY, D. C.

Filed March 26th, 1875.

H. E. ANDREWS, Clerk.
L. H. PILLSBURY, D. C.

DEMURRER.

Endorsed: Filed March 26th, 1875.

H. E. ANDREWS, Clerk.
L. H. PILLSBURY, D. C.

In the Circuit Court of the United States of America
District of West Tennessee.

THE UNITED STATES on the relation of T. E. BROWN,
vs.
THE CITY OF MEMPHIS and others.

The petitioner demurs to the return herein filed, because—

(1.) It presents no sufficient ground for the refusal by the defendants to do what the alternative writ of mandamus requires them to do.

(2.) The Act of the 18th of March, 1873, gave full power to levy the tax to pay the plaintiff's decree, and the Legislature, if it has attempted to do so, had no power to repeal the Act so as to defeat the plaintiff's right to require the levy of the tax.

(3.) The Court cannot, in ordering a levy of taxes to pay the decree, consider past levies which have not been collected and may never be.

(4.) As a matter of fact, the debt due the plaintiff has accrued since the Act of 1867; at any rate, the defendants do not show it accrued before; and the Constitution and law require all taxes to be equal and uniform, and that no one species of property shall be taxed higher or lower than other

property of equal value, and prevent the exemption of any property from taxation; and the Act of March 18th, 1873, makes no discrimination in favor of any person or class of persons.

(5.) The Constitution and the law require that taxes be levied upon the principles stated in the last paragraph, and hence no account can be taken of the fact that some of those upon whom special assessments were laid to pay for the cost of the pavement laid down, paid the assessments levied upon them. The said special assessments were paid voluntarily, and without lawful authority, and constitute no defense to a lawful levy of taxes to pay the said decree. If the parties who have so paid have any equities they are against the city, under the said Act of the 18th of March, 1873, and they are not against the petitioner.

T. E. BROWN, in person.

Filed March 26th, 1875.

H. E. ANDREWS, Clerk.

L. H. PILLSBURY, D. C.

UNITED STATES CIRCUIT COURT.

Western District of Tennessee.

THE UNITED STATES EX. REL.
TALMADGE E. BROWN,
vs.
THE CITY OF MEMPHIS, John Loague, Mayor; S. R. Robbins, Owen Dwyer, C. W. Metcalf, Nich. Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle and G. A. Morti, constituting the Board of Aldermen; and John Zent, P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, Jr., Richard Dougherty, Wm. Gay, Chas. J. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Mhoon and T. A. Ryan, constituting the Common Council of the said city of Memphis; and together composing the General Council of said city.

This cause was this day heard upon the demurrer of the plaintiff to the return of the defendants to the alternative writ of mandamus herein issued, and it appearing to the Court that the said return presents no good cause for not complying with the requirements of the said alternative writ, and that the said demurrer is well taken, it is ordered that the same be sustained. And the said defendants saying nothing more in bar or preclusion of the remedy sought by the plaintiff, and it appearing to the Court that on the 16th day of March, 1875, the said Talmadge E. Brown recovered on the equity side of the Court here of the city of Memphis the sum of two hundred and ninety-two thousand one hundred and thirty-three dollars and forty-seven cents ($292,133.47),

and the costs of the suit, and that an execution has been issued on the said decree, and has been returned with a return of the Marshal thereon endorsed, to the effect that the city of Memphis has no property whereon to levy, and that the execution is returned wholly unsatisfied, and it further appearing that the said city has no money with which to pay the said decree, and no property out of which it can be made, and no means of paying the said decree except by levying a tax especially for that purpose, and that it possesses the power to levy and collect such a tax, and that though often requested so to do, the city of Memphis has wholly failed to pay the said decree, or to levy or collect a tax for the purpose of paying the same; it is therefore considered, ordered and adjudged that the alternative writ of mandamus be made peremptory and final, and that the city of Memphis and its General Council do proceed each year for the ensuing three (3) years, to-wit, 1875, 1876, 1877, respectively, at the same time and in the same manner that other city taxes are assessed, levied and collected, to assess, levy and collect upon all the property within the city taxable by law a tax in addition to all other taxes allowed by law, payable in the lawful money of the United States of America, sufficient in amount, after making due allowance for all delinquencies, insolvencies and defaults, to realize one hundred and twenty-five thousand dollars ($125,000) each year for the years 1875 and 1876 respectively, and so much of the said sum for the remaining year, to wit, 1877, as may be required or necessary to pay and satisfy the balance of the said decree, including interest and costs not satisfied by the taxes collected and paid over during the two preceding years, and to pay over the same as fast as and from time to time as the same may be collected, directly to the said Talmadge E. Brown, or into Court here, to be forthwith paid him without the further order of the Court, until the whole amount of the said decree, including the costs of the suit and the interest that has accrued or may accrue thereon, be paid and discharged. It is further ordered that the Clerk of this Court, whenever the said Talmadge E. Brown shall request the same, shall issue each year during the years 1875, 1876

and 1877, respectively, a peremptory writ of mandamus in accordance with the foregoing judgment, to be served on the city of Memphis and its Mayor and General Council, in the manner prescribed by law. And it is ordered that the plaintiff recover of the defendant the City of Memphis the costs herein expended, and that execution issue therefor.

UNITED STATES CIRCUIT COURT,

Western District of Tennessee.

T. E. BROWN
vs.
CITY OF MEMPHIS.

In the above causes it appearing to the Court that the city of Memphis having levied a special tax under the mandate of the Court, is collecting and paying to the plaintiff or his agents the funds arising therefrom, without having paid the costs of said cause, it is therefore on motion ordered that the mandate herein be so modified as to command the said city by its proper officers to pay the costs of these causes, amounting to the sum of $1420.48, out of any funds now on hand, or from the first that may hereafter be received from such collections, and that a certified copy of this order be served upon said city of Memphis.

PEREMPTORY MANDAMUS WRIT.

Endorsed: Returned and filed Sept. 30th, 1875.

H. E. ANDREWS, Clerk.
By L. H. PILLSBURY, D. C.

UNITED STATES OF AMERICA,
DISTRICT OF WEST TENNESSEE,

The President of the United States: To the city of Memphis, John Loague, Mayor, Owen Dwyer, C. W. Metcalf, Nick. Malatesta, H. G. Dent, I. Happek, J. T. Hillsman, A. J. White, M. J. Doyle, G. A. Morti and S. B. Robbins, constituting the Board of Aldermen, and P. J. Kelly, Herman Caro, Wm. Hewitt, S. J. Camp, Alf. G. Tuther, S. W. Green, H. Luhrman, Jos. Clouston, Jr., Richard Dougherty, Wm. Gay, Chas. G. Fisher, J. S. Carpenter, L. Solari, J. W. Moores, J. W. Cochran, J. D. Danbury, L. D. Grant, Jacob Mhoon, T. A. Ryan and John Zent, constituting the Common Council of the city of Memphis, and together composing the General Council of said city—GREETING:

Whereas, it appearing that on the 30th day of March, A. D. 1875, in this the Circuit Court of the United States for said District of West Tennessee, the cause of T. E. Brown vs. The City of Memphis came on to be heard on the demurrer of the plaintiff to the return of the defendants to the alternative writ of mandamus herein issued, and it appearing to the Court that the said return presented no good cause for not complying with the requirements of the said alternative writ, and that the said demurrer is well taken, it was ordered that the demurrer be sustained; and the said defendants saying nothing further in bar or preclusion of the remedy sought by the plaintiff, and it appearing to the Court that on the 16th day of March, A. D. 1875, the said Talmadge E. Brown recovered in the equity side of the Court here of the city of Memphis, the sum of two hundred and ninety-two thousand one hundred and thirty-three dollars and forty-seven cents

and the costs of this suit, and that an execution has been issued on the said decree, and has been returned with a return of the Marshal endorsed thereon, to the effect that the city of Memphis has no property whereon to levy, and that the execution is returned wholly unsatisfied; and it further appearing that the said city has no money wherewith to pay the said decree, and no property out of which it can be made, and no means of paying the said decree except by levying a tax especially for that purpose, and that it possesses the power to levy and collect such a tax, and that though often requested so to do, the city of Memphis has wholly failed to pay the said decree, or to levy or collect a tax for the purpose of paying the same; it is therefore considered, ordered and adjudged that the alternative writ of mandamus be made peremptory and final, and that the city of Memphis and its General Council do proceed each year for the ensuing three (3) years, to-wit, 1875, 1876, 1877, respectively, at the same time and in the same manner that other city taxes are assessed, levied and collected, to assess, levy and collect upon all the property within the city taxable by law a tax in addition to all other taxes allowed by law, payable in the lawful money of the United States of America, sufficient in amount, after making due allowance for all delinquencies, insolvencies and defaults, to realize one hundred and twenty-five thousand dollars ($125,000) each year for the years 1875 and 1876 respectively, and so much of the said sum for the remaining year, to-wit, 1877, as may be required or necessary to pay and satisfy the balance of the said decree, including interest and costs not satisfied by the taxes collected and paid over during the two preceding years, and to pay over the same as fast as and from time to time as the same may be collected, directly to the said Talmadge E. Brown, or into Court here, to be forthwith paid him without the further order of the Court, until the whole amount of the said decree, including the costs of the suit and the interest that has accrued or may accrue thereon, be paid and discharged. It is further ordered that the Clerk of this

Now therefore, this is to command you the said city of Memphis, and you the said Mayor, and you the said members

of the Board of Aldermen and Common Council and General Council, that in accordance with said decree you proceed to assess, levy and collect a tax upon all the taxable property of the city of Memphis, in addition to all other taxes allowed by law, sufficient in amount, after making due allowance for delinquencies, insolvencies and defaults, to realize one hundred and twenty-five thousand dollars ($125,000), and pay over the same in accordance with the above recited decrees of this Court, and that you make due return of this writ on the fourth Monday of November next.

Witness, Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, this 28th day of June, A. D. 1875.

{SEAL}

H. E. ANDREWS, Clerk.
L. H. PILLSBURY, D. C.

Returned: Came to hand Jan. 29th, 1875. Executed by reading the original in the presence of the members of the Common Council, and also in the presence of the members of the Board of Aldermen which assembled by the General Council, and by leaving the original, of which this is a true copy, with Hon. John Loague, Mayor, &c., on the 29th day of June, 1875.

L. B. EATON, U. S. M.
F. H. TORBETT, Deputy.

It was admitted by said T. E. Brown that the said writ which the said John R. Flippin and others moved to set aside and quash was issued under and by virtue of the aforesaid judgment rendered on the 30th day of March, 1875, and none other, and that there was no other judgment awarding said writ. It was further admitted that said John R. Flippin became Mayor of said city on the 15th day of January, 1876; that said W. A. McCloy and others named in said writ as

Aldermen, and P. J. Kelly and others therein named as Councilmen, became such on the 15th day of January, 1876. It was further admitted that on the 21st day of September, 1876, and for the year 1876 the General Council of said city levied a tax of one dollar and sixty cents on every one hundred dollars of taxable property, for purposes specified in Chapter 92, Sec. 64 of the Act of the Legislature of Tennessee, approved March 23rd, 1875, and for purposes other and different from the payment of the judgment of T. E. Brown.

This was all the evidence introduced by either party on the hearing of said motion.

Thereupon the said John R. Flippin and others above named moved to set aside and quash said writ, upon grounds set forth in their written motion on file in the cause, which said motion is in words and figures following:

THE UNITED STATES ON THE RELATION OF T. E. BROWN,
vs.
THE CITY OF MEMPHIS AND THE GENERAL COUNCIL THEREOF.
No. 1874½ Law Docket.

John R. Flippin and W. A. McCloy, W. N. Brown, James Elder, J. W. Cochran, John Zent, L. D. Grant, S. W. Green, H. G. Dent, A. B. Morrison, P. J. Kelly, James Speed, Jno. W. Kearns, J. F. Blaise, T. J. Beasley, Jno. Donovan, H. M. Neely, W. H. Bates, John M. Rourke, Rich'd Dougherty, R. C. Williamson, Thos. Boyle, E. Hardin, H. Seessel, E. J. Karr, Benjamin Bingham, P. M. Patterson and John Scheibler, move to quash the writ of mandamus issued herein on the 24th day of May, 1876, upon the following grounds:

1. Said writ was issued by the Clerk of this Court without authority to do so. It was not authorized by any judgment of this Court, or by any order or fiat of a Judge thereof.

2. It is addressed to persons not parties to the cause, nor in any wise before the Court, and commands them to do cer-

tain acts without their having had a day in Court, or opportunity to make defense.

3. That part of the final judgment rendered in this cause on the 30th day of March, 1875, which authorizes the Clerk of this Court, whenever the said T. E. Brown should request the same, to issue each year during the years 1875, 1876 and 1877, a writ in accordance with the terms of said judgment, is void.

The Court had already, by the prior portions of said judgment, made complete and final disposition of the subject matter of said litigation. It had no power to authorize the issue of other and further writs, as is in said clause provided.

By said clause, the Court delegated to the Clerk and plaintiff Brown a power that belonged only to itself. Said clause is void for uncertainty, failing to fix the time of the issuance or return of said writ. It fails to declare to whom said writs, when issued, should be addressed. The writ in question is directed to the persons therein named at the mere dictation of the relator Brown.

4. The said John R. Flippin and others named in said writ were respectively elected to the offices of Mayor, Aldermen and Common Councilmen on the first Thursday after the second Monday of January, 1876, under and by virtue of a general Act of the Legislature of the State of Tennessee, passed March 23, 1875, "entitled An Act to regulate and "organize municipal corporations of certain population, and "for the increase and diminution of their powers."

Said Act, being Chapter 92 of the Acts of 1875, from section 33 to its close, is the charter of the city of Memphis, said city having a population by the Federal census of 1870, of over 35,000. By its 81st section all laws and parts of laws in conflict with it, are repealed.

By the same section, Chapter 47 of the Acts of 1873, entitled "An Act to amend the charters of all incorporated towns "and cities in the State," is repealed.

By section 63 of said Act it is enacted, "that no such "municipality shall assess, levy or collect a greater rate of

"taxes than one dollar and sixty cents on each one hundred "dollars' worth of taxable property in such city, *for any and "all purposes.*" * * *

By section 64 thereof it is enacted, that of the one dollar and sixty cents permitted to be levied by the 63d section, "not more than one dollar, or one per cent., shall be appro- "priated to defraying general expenses, such as police and "fire departments, officers' salaries, water and lights, *improv- "ing or repairing streets, &c.;* and not more than sixty cents "shall be appropriated to special purposes; of this amount "twenty cents shall be appropriated to the payment of inter- "est on the bonded debt; twenty-five cents shall be appro- "priated to providing a sinking fund to retire the bonded "indebtedness; ten cents shall be appropriated to the main- "tenance of city schools, and five cents shall be appropriated "to the payment of judgments."

On the 21st day of September, 1876, the General Council of said city levied a tax of one dollar and sixty cents on every one hundred dollars of taxable property, and appropriated the same in the manner and to the purposes set forth in said section 64.

Chapter 47 of the Acts of 1873 having been repealed as aforesaid, the General Council has exhausted its powers of taxation.

The Legislature had power to repeal said Act of March 18, 1873. That Act was passed after the contracts for paving, under which the said indebtedness to T. E. Brown accrued, had been executed and fully performed on the part of said Brown. It was not in force at the time the indebtedness to him accrued.

The Legislature had power to limit the rate of taxation, as is done by said section 63 of the Act of March 23, 1875, and said limitation was valid as against the said indebtedness to T. E. Brown. By the Act of February 13, 1854, entitled "An Act to amend the charter of the city of Memphis," being Chapter 195 of the Acts of 1853–54, it was enacted that "the Board of Mayor and Aldermen shall have power to lay "and collect taxes for the purpose of defraying expenses

"necessarily incurred in administering the affairs of the city, "*but the tax for that purpose shall never exceed one per centum, or* "*one dollar on every hundred dollars' worth of property, within* "*the city limits, liable to taxation*, and valued at cash prices."

This provision remained in force until, and was literally re-enacted by the 55th section of the Act of December 1st, 1869, entitled "An Act to reduce the charter of the city of "Memphis, and the several Acts amendatory thereof, into one "Act, and to revise the same," being Chapter 26 of the Acts of 1869–70. And this latter Act remained in full force until the passage of said Act of March 23, 1875, except in so far as the powers of taxation were enlarged by the said Act of March 18, 1873.

The limit, therefore, upon said city's powers of taxation, as fixed by said section 63 of the act of March, 1875, was but the re-enactment of a law in force continuously from 1854 to that time, and in force during all the period of the execution of said paving tracts, said Act of March 18, 1873, having been passed after the complete execution of said paving contracts.

Wherefore it appears that said writ commands the performance of an illegal act. Obedience to its mandate would be an official misfeasance on the part of said General Council, such an act being made a misdemeanor by the statutes of the State of Tennessee.

5. The said city of Memphis, for the year 1873, and at the same time time that other taxes were levied for that year, levied a tax on every one hundred dollars of taxable property, for the purpose of paying the said indebtedness to said Brown. The assessed taxable property of the city for that year was $26,557,844.

Again, in the year 1874, the General Council of said city levied a tax of thirty cents on every one hundred dollars of taxable property, for the purpose of paying said indebtedness. The assessed taxable property of the city for that year was $27,757,314.

Again, in the year 1875, the General Council of said city levied another special tax of fifty-four cents on every one hun-

dred dollars of taxable property, for the purpose of paying said indebtedness. The assessed taxable property of said city amounting for that year to $29,970,043.

Said three levies, if collected in full, would realize the sum of $415,015.37. The sum of $193,349.92 has been actually realized therefrom, and paid over to said Brown, leaving uncollected the sum of $257,665.45.

Said taxes levied as aforesaid, bear interest from the 1st day of January, next succeeding the levy; that is to say, the tax levied for 1873 bears interest from January 1st, 1874, &c., &c., and said taxes are by virtue of the laws of the State, a lien upon all the property of the tax debtor.

Two years are allowed by statute of the State for the redemption of realty sold for unpaid taxes.

For these and other causes, they pray that said writ may be set aside and quashed.

S. P. WALKER,
Attorney for Defendants.

And said motion having been heard and considered by the Court, was, after argument of counsel for both parties, denied and overruled; to which action of the Court said Flippin and others above named excepted, and tendered this their bill of exceptions, which is signed, sealed and made part of the record of the cause, this 3d day of January, 1876.

CONNALLY F. TRIGG.

ANSWER OF DEFENDANT.

IN THE UNITED STATES SUPREME COURT.

THE UNITED STATES EX. REL.
JOHN R. FLIPPIN, ET. AL.

VS.

CONNALLY F. TRIGG.

The defendant, Connally F. Trigg, waives the issue or service of a rule to show cause why a writ of mandamus should not issue, according to the prayer of the petition, and here consents that the application for the writ may be heard and determined upon the petition of the relators and the answer of this defendant now here filed. And defendant in answer to said petition says: It is true that relators moved to set aside and quash the writ of mandamus as is alleged and set forth in their petition herein; it is true that said motion was heard and determined, as alleged in the petition herein; that the same was overruled; that the relators excepted to the action of said Circuit Court, in overruling their said motion, and thereupon a bill of exceptions was tendered to and signed by this defendant, and made part of the record, all of which is set forth truly in the petition of of relators. Defendant further admits that the bill of exceptions is truly set forth in the exhibit to this petition.

Defendant further answers that the motion having been brought to a hearing as stated in the petition, and the records and evidence upon which the same was based having been brought to a hearing, as stated in the petition, this defendant was of opinion that there was no valid or sufficient ground upon which to set aside or quash said writ, and the motion to quash was therefore refused.

For certainty as to each and all the facts herein stated, respondent refers to the exhibits to the said petition, being copies from the records of the court, and prays the same may be taken as a part of this answer.

This respondent now submits to this Hon. Court,—

1. That there was no error in the judgment of said Circuit Court in refusing to quash said writ.

2. That whether there was error in such refusal or not, said motion was directed to the discretion of respondent as judge presiding in the Circuit Court, and in pronouncing judgment he excercised that discretion, and this Honorable Court will not award the writ of mandamus to compel him to decide contrary to what he believes his decision ought to be.

3. The judgment of the Circuit Court referred to in the petition, being a judgment refusing to quash a final writ under a final decree issued for the purpose of executing such decree, is not subject to revision or reversal by any other court.

4. It appearing that the Circuit Court has pronounced a judgment on the motion to quash the writ, and that such judgment remains in force, respondent can not be compelled by mandamus to disregard or reverse it, as a mandamus can not perform the office of a writ of error.

Wherefore respondents prays that the said petition may be dismissed and that he may go hence.

CONNALLY F. TRIGG.

UNITED STATES Ex. Rel.

JOHN R. FLIPPIN, et. al.,

—VS—

CONNALLY F. TRIGG.

Brief for Relators

BY

W. Y. C. HUMES,
S. P. WALKER.

In the Supreme Court of the United States.

UNITED STATES EX. REL.
JOHN R. FLIPPIN ET AL.,
vs.
CONNALLY F. TRIGG.

PETITION FOR MANDAMUS.

No.....

BRIEF FOR PETITIONERS.

1. The mandamus proceeding is a personal one, and abates with the death, resignation or removal of the officer against whom it is commenced. It cannot be revived against his successor in office.

The Secretary vs. McGarrahan, 9 Wall., 313;
The U. S. vs. Boutwell, 17 Wall., 607;
Carson vs. The Commissioners, 64 N. C., 56.

Cases in the State Courts to the contrary, cited in 2 Dillon on Corp., Secs. 703, 712, go upon grounds that were urged in argument in the case of the United States vs. Boutwell, supra, and repelled by the Court.

2. Petitioners were not parties to the cause. The final judgment awards, and could award no writ against them.

The case presents the extraordinary feature of a peremptory writ (admitting of no return, except of obedience), addressed to certain persons *by name*, those persons not being parties to the Record, and nothing of record to show that they held the offices ascribed to them by the writ. The fact that they are the successors in office of the original defendants appears for the first time by their admission on the motion to quash the writ. That admission cannot make good a writ absolutely void as to these petitioners.

3. At the outset of his proceeding, the relator T. E. Brown had the option to proceed solely against the corporation in its corporate name. And if that course had been adopted, no abatement could have occurred.

Tapping on Mand., * 314, 315;
Dillon on Corp., secs. 699 to 703.

What officer was charged with the duty of obeying the writ, would then have remained an after question, to be determined in a contempt proceeding, in case of disobedience to the writ.

But he preferred and adopted the other course of proceeding directly against the officers in the first instance. His petition sets forth the names of the Mayor, and every member of the General Council; his alternative writ ran against them by name; they made return to it by name, and not in the name of the corporation; and the final judgment awards the writ against the General Council, meaning necessarily those officers who were before the Court, as composing the Council. All subsequent writs must conform to this judgment; and conformity being impossible, the officers having gone out of office, the whole proceeding must abate.

4. The writ which petitioners moved to quash was not authorized by any valid judgment of the Circuit Court. One clause of the final judgment is as follows: "It is further

"ordered that the Clerk of this Court, *whenever the said T. E.* "*Brown shall request the same*, shall issue each year, during "the years 1875, 1876 and 1877, respectively, a peremptory "writ of mandamus, in accordance with the foregoing judg- "ment," &c.

The writ issued in 1876 was authorized solely by that clause. By it, the Court delegated to the relator Brown the power to say when the writ should issue, and failed to specify when it should be returned.

The writ of mandamus is not a term writ; the return day must be fixed by the Court, in its discretion.

Harwood vs. Marshall, 10 Md., 451.

The writ is void, having been issued at the dictation of the relator Brown, and made returnable to a day not fixed by the Court.

5. The proceeding by mandamus in this Court is the proper and only remedy for relators.

An order of the Circuit Court, quashing or refusing to quash a writ, is not such a judgment as can be reviewed by writ of error.

Mountz vs. Hodgson, 4 Cr., 324;
Boyle vs. Zacharie, 6 Pet., 648;
Toland vs. Sprague, 12 Pet., 300;
McCargo vs. Chapman, 20 Pet., 555.

In the latter case, this Court declared that if an execution should be issued, not authorized by the judgment, and the Court below should refuse to quash it, a mandamus would seem to be the proper remedy. "It is a writ which may be "issued to inferior Courts and magistrates, to require them "to execute that justice which the party is entitled to, and "which by law they are enjoined to do, and where there "is no other remedy."

Ordinarily this Court will not do more than compel the

Circuit Court to act, and render some judgment, in a case of which it has improperly refused to take jurisdiction.

Railroad Company vs. Wiswall, 23 Wall., 507;
Insurance Company vs. Comstock, 16 Wall., 270.

The Court will not control the judicial discretion of the Circuit Court, by dictating what judgment it shall render. But it is not matter of discretion in that Court to execute and enforce a void writ, and this Court will prevent it by mandamus.

W. Y. C. HUMES,
S. P. WALKER,
For Relators.

United States Supreme Court.

JOHN R. FLIPPIN, ET. AL.,
vs.
CONNALLY F. TRIGG.

BRIEF FOR RELATORS ON PETITION FOR MANDAMUS.

S. P. WALKER,

COUNSEL FOR PETITIONERS.

United States Supreme Court.

JOHN R. FLIPPIN, ET. AL.,

vs.

CONNALLY F. TRIGG.

BRIEF FOR RELATORS ON PETITION FOR MANDAMUS.

On the 30th day of March, 1875, the Circuit Court for West Tennessee, rendered judgment in behalf of T. E. Brown, awarding a peremptory writ of mandamus against the City of Memphis, and its then Mayor and General Council, commanding them to levy a tax, &c. The petition for mandamus filed by Brown, set forth the names of the Mayor and each member of the General Council, and by name they are made parties to the proceeding.

Record 20, 21.

The alternative writ issued to them by name.

Record 22.

They made return to it in their own names and not in the name of the city.

Record 25.

And it must be intended that the judgment of the Circuit Court (Record p. 31) awarding the peremptory writ against the City and its General Council, meant to refer to those individuals who composed the General Council, and were parties to the cause.

Under that judgment without any order of revivor, or substitution (if such order was possible,) without even a suggestion of record that these petitioners are successors in office of the originals defendants—the Clerk of the Circuit Court

on the 24th day of May, 1876, issued a peremptory writ, directed to the petitioners (who are nowhere named in said proceeding) and commanding them to do the act, which, on the face of the proceedings, should have been performed by wholly different persons.

On the 27th of November, 1876, petitioners moved the Circuit Court to quash the writ of mandamus that was addressed to them; the principal grounds of the motion being (1) that the writ was unwarranted by the judgment, and (2) that petitioners were not parties to the cause.

Record p. p. 4, 5, 37-41.

The motion was heard by the Conrt below, and overruled.

Record 5.

Thereupon petitioners tendered a bill of exceptions, showing the motion, and the evidence upon which it was based, which bill was duly signed and made part of the record.

Record 5, *et seq.*

Petitioners now apply to this Court for a mandamus, to be addressed to the Judge of the Circuit Court, and requiring him to set aside and quash said writ.

1. *Is the mandamus from this Court the proper remedy to redress the grievance complained of in the petition?*

For the purpose of arguing this question, I assume that the writ was void, because unwarranted by the judgment, and issued against persons not parties to the cause.

The case therefore is simply this: The Circuit Court has rendered judgment against A. B. and under that judgment has issued a writ against C. D. and has overruled his motion to quash such execution.

What is C. D.'s proper remedy? He cannot maintain a writ of error to reverse the judgment because (1) he is not a party to the judgment, and has no interest in its reversal.

It is not the judgment that he complains of or has right to complain of but of a writ unauthorized by any judgment.

2. The order of the Circuit Court quashing or refusing to quash an execution cannot, in any case, be reviewed by writ of error.

McCargo vs Chapman, 20 How., 555.

3. Writ of error will not lie to bring up the execution, where there is no judgment awarding it.

"It is said in Co. Litt., 288, 6, that a writ of error lieth "when a man is grieved by an error in the foundation, pro- "ceeding, judgment, or execution in a suit. But it is added "in the same authority, 'without a judgment or an award "'in the nature of a judgment, no writ of error doth lie.'"

McCargo vs. Chapman, *supra*, p. 557.

On the question as to what is the remedy in case of a writ issued, without any order or judgment to warrant it, there is an apparent conflict in the views of this Court, as expressed in two cases of Boyle vs. Zacharie, 6 Peters 648, and McCargo vs. Chapman, supra. In the former case, the Court says: "If, therefore there is an erroneus *award of execution*, not "warranted by the judgment, or erroneous proceedings un- "der the execution, a writ of error will lie to redress the "grievance."

In the latter case it is said: "If in the language of this "Court, in Boyle vs. Zacharie, an execution should be "issued not authorized by the judgment, the Court, on mo- "tion, would set it aside or quash it; and should it refuse to do "so, *a mandamus would seem to be the proper remedy.* It is a writ "which may be issued to inferior Courts, and Magistrates, to "require them to execute that justice which the party is "entitled to, and which by law they are enjoined to do, and "where there is no other remedy." p. 557.

The Court here seems to dissent from the the language I have quoted from Boyle vs. Zacharie, and it commends the writ of mandamus as the proper remedy where a writ is issued unwarranted by the judgment. A careful examination of the language used in Boyle vs. Zacharie will show that there was no necessity for such dissent. In Boyle vs. Zacharie the Court said that a writ of error would lie where there was erroneous *award of execution.* In McCargo vs. Chapman, the Court evidently had in mind the case of a writ unwarranted by the judgment, not awarded at all; in which latter case, there is no judgment or award of execution, to which a writ of error would lie. I dwell upon this distinc-

tion, because it involves the very point upon which the case at bar turns. There is no judgment against these petitioners. The paper, for the sake of brevity, called a writ, is not a writ at all, though having the form and semblance of one. It is a writ of such character that the Clerk had no power to issue it except when authorized by judgment of the Court. The case therefore is the very one contemplated by the Court, in McCargo vs. Chapman, as properly remediable by mandamus. The propriety of the practice there recommended is well supported by the acts of Congress, and the decisions of this Court.

This Court has power to issue "writs of mandamus in "cases warranted by the principles and usages of law, to "any Courts appointed under the authority of the United "States."

Rev. Stat. sec. 688 (13th sec. Judiciary act.)

It is settled that if the inferior Court refuses to hear and determine on the merits, a cause of which it has jurisdiction, this Court will compel it to do so by mandamus.

Insurance Co. vs. Comstock, 16 Wall 270.
R. R. Co. vs. Wiswall, 27 Wall 507.
Exparte Newman, 14 Wall 152.

If this Court will compel the inferior Court to act in a case of which it has jurisdiction, will it not on the same principle compel it to desist from action in a case of which it has no jurisdiction, and where there is no remedy by writ of error or appeal?

The case of Newman, exparte, *supra*, is quoted in the brief of respondents counsel to establish the proposition that mandamus cannot perform the functions of a writ of error; and that this Court, while it will, in a proper case, compel the inferior Court to act, will not specifically direct what action it shall take. As I read that decision, there is underlying the whole of it an admission or assumption by the Court, of the proposition that the Circuit Court will be compelled to hear, and determine a case of which it had jurisdiction but which it had refused to hear. "Viewed *in the light of the return*, the "Court is of opinion that the rule must be discharged, and

"the petition denied." Referring back, we find that the Circuit Court had decided (1) that the Prussian Consul had jurisdiction, (2) that, under the treaty his jurisdiction was exclusive, and (3) that the proof showed that the case having been heard and adjudicated by the Consul that adjudication was conclusive against the libellants. The petition, therefore was denied because it was matter of discretion with the Circuit to take or decline jurisdiction and the return showed that that discretion had been fairly and properly exercised.

Certainly I am not called on to deny that this Court will not control the discretion of the Circuit Court by directing what judgment it shall enter. But it is equally true that where the Circuit Court either acts in a matter of which it has no jurisdiction, or refuses to act in a matter of which it is by law bound to take jurisdiction, this Court will compel it to act or desist from action, as the case may be. In exparte Newman, the whole discussion was indulged by the Court in order to show that the Circuit Court was not in law bound to take jurisdiction; it was one of the rare, exceptional cases, in which its jurisdiction was discretionary.

In the case at bar, the writ having been issued against persons not parties to the cause, *the Circuit Court had no power or jurisdiction whatever, as against them.* When therefore they moved that Court to set aside the so-called writ, *it was not matter of discretion in the Circuit Court to deny that motion.* It might as well have been said, in the first two cases above cited; that the question of jurisdiction was one necessarily to be decided by the Circuit Court, and that having made decision of it this Court would not control its judicial discretion, by directing a different decision.

The principle settled by these decisions is that whenever the Circuit Ceurt has pronounced upon a case *within its jurisdiction*, its judgment is not reversible, except by writ of error or appeal, in the cases, and manner prescribed by statute. In such case it has power to render judgment, *and its judgment is therefore valid*; and until reversed in the prescribed mode is entitled to be executed. But if that Court has no jurisdiction of the subject matter or the person, it has

no power in the premises, all its proceedings are void, and this Court will not treat or respect its decision as one within its judicial discretion.

In a case of which it has jurisdiction its judgment is reversible only; having no jurisdiction, it is a nullity, and this Court will control it by mandamus, in virtue of its supervisory power over all inferior Federal tribunals.

In the case of Parks, exparte, decided by this Court at the commencement of the October term 1876, and yet unreported, it was held that *where an inferior Court has jurisdiction of the cause and the person* in a criminal suit; and no writ of error lies, this court will not on habeas corpus, review the legality of the proceedings; that *it is only where the proceeding below was entirely void, for want of jurisdiction*, or other cause, that such relief would be given, and that whether a matter for which a defendant is indicted in the District Court is or is not a crime, by the laws of the United States, is a question which that Court must decide, and is within its jurisdiction. A clear statement of the principle that where the Circuit Court is proceeding without jurisdiction, this Court will exercise a summary control over it, by habeas corpus, mandamus, certiorari, or other such writ as may be necessary and proper to redress such wrong on the part of the inferior Court.

This Court will examine for itself the question of jurisdiction, in the inferior Court; and if it has jurisdiction, will compel it to act, and if it has not, will force it to desist.

It is suggested that a bill in equity would be the proper remedy. In answer, I can only say that that would be to remit the party to the equity side of the same Court that has, on its law side, persisted in the enforcement of a writ against one over whom it had no jurisdiction. I take it as axiomatic, under our Federal judiciary system, that no final writ, even if jurisdictional and valid, can be awarded by the Circuit Court, without an opportunity to the defendant to test its correctness, *in this Court*, in the cases provided for by statute; much less will it be allowed to enforce a void final writ, which the party has had no opportunity to review, by writ of error.

II.

The mandamus proceeding is a personal one, and abates with the death, resignation or removal of the officer against whom it is commenced.

Carson vs. The Commissioner, 64 N. C., 56;
The Secretary vs. McGarrahan, 9 Wall., 313;
Tapping on Mand., * 410.

"No matter out of what facts or relations the duty has "grown, what the law regards, and what it seeks to enforce, "by the writ of mandamus, is the personal obligation of the "individual to whom it addresses the writ. If he be an "officer, and the duty be an official one, still the writ is aimed "exclusively against him as a person, and he only can be "punished for disobedience. The writ does not reach the "office, it can not be directed to it. * * * It neces- "sarily follows from this, that on the death or retirement "from office of the original defendant, the writ must abate."

United States vs. Boutwell, 17 Wall. 707.

In the language just quoted, the Court no doubt had in mind only the case before it, and was not considering the case of a proceeding against a corporation. In the latter case, the relator has the option to address his writ to the corporation, in its corporate name, or to the corporate officers whom he conceives to be charged with the duty in question.

Tapping on Mand., * 314, 315;
Dillon on Mun. Corp., secs. 699 to 703.

"If the writ is directed to the corporation, it has been held "good. Bt if it be directed to those who, by the constitution "of the corporation ought to do the act, without doubt it is "good also."

Rex vs. The Mayor, 1 Ld. Raym'd, 559.

If the relator elects to address his writ to the corporation, no doubt he would avoid the danger of abatement. But where he elects to proceed against the officers, the case falls directly within the decision of the case of the U. S. vs. Boutwell, supra. Many State cases can be cited to the contrary, but they uniformly go upon grounds that were urged in vain upon this Court in the Boutwell case; they wholly ignore

the well settled English doctrine of abatement, as stated in that case, and which remained in force until changed by Act of Parliament.

3. The writ is void on another well settled principle:

"The Court, as we have seen has power to, and will, for "the purposes of justice, mould the *rule* for a mandamus, but "*cannot* remould the writ after it has been issued, and award "a peremptory mandamus, in a more limited or other form "than the original mandamus; the peremptory writ must go "in the terms of the original writ, or not at all."

Tapping on Mand., * 409;

Chance vs. Temple, 1 Iowa, 198–196, in which is stated with great clearness the rule that the judgment must conform to the alternative writ and the peremptory writ to the judgment.

4. One clause of the final judgment in favor of the relator Brown, is as follows: "It is further ordered that the clerk "of this Court, *whenever the said T. E. Brown shall request the* "*same*, shall issue each year during the years 1875, 1876 and "1877, respectively, a peremptory mandamus, in accordance "with the foregoing judgment, &c."

Record 32.

The writ issued in 1876, and which these petitioners moved to quash, was authorized solely by that clause. By it, the Court delegated to the relator Brown the power to say when the writ should issue, and failed to specify when it should be returned. The writ of mandamus is not a term writ; it issues on, and must be returned to a day to be fixed by the Court.

Harwood vs. Marshall, 10 Md., 451.

This writ was issued on a day named by the relator Brown, and made returnable to a day not fixed by the Court.

S. P. WALKER,
Counsel for Petitioners.

IN THE

Supreme Court United States,

OCTOBER TERM, 1876.

JOHN R. FLIPPIN, et. al.)

vs.

CONNALLY F. TRIGG.)

Petition for Writ of Mandamus.

BRIEF FOR THE DEFENDANT.

IN THE

Supreme Court United States,

OCTOBER TERM, 1876.

JOHN R. FLIPPIN, et. al.)

vs.

CONNALLY F. TRIGG.)

Petition for Writ of Mandamus.

BRIEF FOR THE DEFENDANT.

In March, 1875, Talmadge E. Brown, in accordance with the mandate of this Court, (see 20 Wallace, 290), recovered in the Circuit Court of the United States for the District of West Tennessee, against the City of Memphis, a decree for the sum of $292,133.47, with interest and cost, and was awarded an execution. The execution was issued and was returned no property found, and thereupon a proceeding for a mandamus to compel the levy and collection by the city of a tax for the payment of the decree was commenced, and after answer and defense by the city, resulted in a judgment, on the 30th day of March, 1875, requiring the levy and collection of the tax, and the payment of the amount collected on the decree.

The judgment remains in full force.

The United States on the relation of Talmadge E. Brown were plaintiffs, and the City of Memphis, and its then Mayor, and the members of its General Council (naming them) were defendants.

The judgment was that the City of Memphis and its General Council proceed each year for the then ensuing three years, to-wit: 1875, 1876 and 1877, respectively, to assess, levy and collect a tax in addition to all other taxes allowed by law to be levied, sufficient in amount to realize $125,000 each year for the years 1875 and 1876, respectively, and so much for 1877 as might be necessary to satisfy the balance of the said decree not satisfied by the taxes collected and paid over during the two preceding years, and to pay over the same as collected, until the whole amount of the decree and the costs of the suit should be paid, and that the Clerk of the Court, whenever Brown should request the same, should issue each year during the said years 1875, 1876 and 1877, respectively, a peremptory writ of mandamus in accordance with the said judgment, to be served on the City of Memphis and its Mayor and General Council in the manner prescribed by law.

Record, pp. 32–33.

In pursuance of this judgment a peremptory writ of mandamus issued from the office of the Clerk of the Circuit Court on the 28th of June, 1875, returnable to the November term, 1875, of the Court, directed to the city and its Mayor and General Council, naming them, and was executed on the 29th June, 1875.

Record, pp. 34–36.

On the 24th June, 1876, a second peremptory writ of mandamus was issued in like manner, returnable to the November term, 1876, of the Court, directed as the first had been, and was executed on the next day.

Record, pp. 8–11.

The first writ specially commanded the levy, collection and payment of the tax for 1875, and the second for 1876.

Each writ was directed not only to the City of Memphis, but to the persons by name who at the dates of the issuance were Mayor and members of the General Council.

On the return of this second writ, November 27th, 1876, the persons who were Mayor and members of the General Council moved the Court to set aside and quash the writ for certain reasons which were stated.

Record, pp. 4–5, 37–41.

The motion was heard by the Court, and overruled.

Record, pp. 5, 41, 42.

The parties moving then tendered their bill of exceptions, which was signed by the Judge.

Record, pp. 7–41.

And they now, by petition to this Court, ask that a writ of mandamus be issued to the Hon. Connally F. Trigg, the Judge presiding, requiring him as Judge of the said Circuit Court to set aside and quash the said writ.

Record, p. 6.

Judge Trigg has tendered his answer, along with the petition, and the case is for hearing as if there had been a rule and return.

Record, pp. 42–43.

The ground of defense relied on in the answer of Judge Trigg, which I will first notice, is—

The Circuit Court having pronounced a judgment on the motion to quash the writ, and such judgment remaining in force, Judge Trigg cannot be compelled by mandamus to disregard it, nor can the court treat the mandamus as a writ of error, and by means of it proceed to revise the proceedings, and, if error is found, reverse the judgment.

The ground of the application for the writ is the usual one, that the petitioners have rights, and are without any other remedy to enforce them.

This Court has frequently decided that such ground does not authorize it to take jurisdiction of a case not otherwise within its prescribed jurisdiction.

In Newman Ex parte 14, Wallace 152, the Court said: "The principles and usages of law do not warrant the use of the writ [of mandamus] to re-examine a judgment or decree of a subordinate Court in any case; nor will the writ be issued to direct what judgment or decree such Court shall render in any pending case; nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ when issued to a subordinate Court is to direct the performance of a ministerial act, or to command the Court to act in a case where the Court has jurisdiction and refuses to act; but the Court will never prescribe what the decision of the subordinate Court shall be; nor will the supervisory Court interfere in any way to control the judgment or discretion of the subordinate Court in disposing of the controversy."

14 Wallace, pp. 165–166.

No case could better illustrate the universality of the principles stated than the one cited. A libel was filed by Prussian seamen in the District Court against a Prussian vessel for unpaid wages. The defense was that the Consul-General of the North German Union had exclusive jurisdiction of the matter. The District Court decided *it* had jurisdiction, and pronounced a decree for the libellants. On appeal the Circuit Court reversed the decree, and dismissed the libel on the ground that the Consul had exclusive jurisdiction. The amount in controversy being only $700, no appeal lay to the Supreme Court, and so the libellants applied for a mandamus to compel the Circuit Judge to entertain jurisdiction of the cause, and to hear and decide the merits of it. The mandamus was refused.

In addition to what has been quoted, the Court said further, after stating that the Supreme Court might affirm or reverse a judgment or decree of a Circuit Court on writ of error or appeal: "But no such power is given under a writ of mandamus, nor is it competent for the superior tribunal, under such a writ, to re-examine the judgment or decree of the subordinate Court. Such a writ cannot perform the functions of an appeal or writ of error, as the superior Court will not, in any case, direct the Judge of the subordinate Court what judgment or decree to enter in the case, as the writ does not vest in the superior Court any power to give any such

direction, or to interfere in any manner with the judicial discretion and judgment of the subordinate Court."—pp. 169–170.

In this case Judge Trigg, sitting in the Circuit Court, has passed on the motion to quash the writ of mandamus, and his judgment has been entered, and remains in force, and the attempt is to have him disregard it, or else to revise and reverse it, by means of the mandamus this Court is now asked to issue.

Ex parte DeGroot, 6 Wallace 497, and the cases there cited, are the same in principle as Newman Ex parte.

And see United States vs. Addison, 22 Howard 174, 183–185.

Independent of the ground just stated, the matter before the Circuit Court was whether it would quash a writ of mandamus issued for the purpose of compelling the levy and collection of a tax to pay a final decree of the Court awarding a sum of money.

The mandamus Judge Trigg was asked to quash was a writ of final execution, and so, completely within the control of the Court.

Riggs vs. Johnson County, 6 Wall., 166, 188–200.
United States vs. Council of Keokuk, 6 Wallace, 514 and 518.
Mayor vs. Lord, 9 Wallace, 409, 414.
Ex parte Holman, 28, Iowa R., pp. 97–99, 101, 104–107, 109–111, 111–112.

It has many times been decided that an order quashing, or refusing to quash such a writ of execution, is one which cannot be revised or reversed on appeal or writ of error.

Mountz vs. Hodgson, 4 Cranch, 324.
Boyle vs. Zacharie, 6 Peters, 648, 655–658.
Evans vs. Gee, 14 Peters, 1.
McCargo vs. Chapman, 20 Howard, 555.

The ground last mentioned may be stated more generally thus: Whether it would or would not grant the motion to quash the writ of mandamus was addressed to the discretion of the Circuit Court. Having exercised that discretion by refusing to quash, no other Court has the authority to reverse its action.

High on Extraordinary Legal Remedies, Secs. 156–176, and the cases cited.
Wylie vs Cox, 14 Howard, 1.
Connor vs. Peugh, 18 How., 394.
Warren vs. Norton, 20 How., 448.
The Secretary vs. McGarrahan, 9 Wallace, 298, 312.
Litchfield vs. Register, 9 Wallace, 575.

But if the Court should look to the grounds of the motion to quash the writ of mandamus, it will find the action of the Circuit Court correct.

The first ground of the motion is, substantially, that the persons who are Mayor and members of the General Council, and who make the motion, were not parties to the judgment awarding the mandamus rendered in March, 1875, and are not in privity with those who were parties, and hence are not bound by the judgment, nor required to obey the writ.

It is to be observed that the petition for mandamus, the alternative writ, the judgment of March, 1875, awarding the peremptory mandamus, and the peremptory writ ordering the levy and collection of the tax for 1875, named first the City of Memphis as defendant, and then the persons who were Mayor and members of the General Council.

According to the original doctrine of the King's Bench, the proceedings should have been against the city in its corporate name, and not against the Mayor and General Council.
Regina vs. Mayor, etc., of Hereford, 2 Salkeld, 701.
The King vs. Taylor, 3 Salkeld, 231.

In this country, and particularly in this Court, while a direction to the corporation by name is admitted to be technically correct, it is nevertheless settled that a mandamus to levy a tax to provide for the payment of a judgment against the municipality may properly run to the Mayor and Aldermen of the corporation, without being directed to the municipality in its corporate name.
Mayor vs. Lord, 9 Wallace, 409.

In State, etc., vs. The City of Milwaukee, 25 Wisconsin, 122, it was held that an alternative mandamus may properly run to the Mayor and Common Council of a city by their titles of office, without any allegation or specification as to the names of the persons who hold the respective offices; and the peremptory writ, if granted, will run in like manner to the persons who then held those offices.—pp. 126, 134.

In People vs. Mayor of Bloomington, 63 Illinois, 207, it was held that a writ of mandamus to enforce a corporate duty was properly directed to the Mayor and City Council in their official capacity, instead of to the City of Bloomington.

And People vs. Common Council, 3 Keyes (N. Y.), 81, 86, is to the same effect.

And see Rex vs. Mayor of Abingdon, 1 Lord Raymond, 559, 560, where Chief Justice Holt said:

"If the writ is directed to the corporation it has been held good. But if it be directed to those who by the constitution of the corporation ought to do the act, without doubt it is good also."

It follows that the judgment of March, 1875, would have been good if it had named only the City of Memphis as a defendant. It would have been equally good had it omitted to name the city, and had named the Mayor and General Council only. And, therefore, as the city, and the Mayor and the General Council, by their respective official designations, and the individuals who were Mayor and members of the General Council, were each and all made defendants, the judgment must necessarily be good.

If the individuals were unnecessary parties, which is the most that can be said, the fact that they were parties would not even render the proceeding erroneous, much less make the judgment ineffectual as against the municipality.

Substantially, the proceeding to obtain the mandamus, the judgment and the writs were against the city in its corporate capacity, and against the persons who were Mayor and members of the

General Council only because they represented, and to the extent to which they represented, the city. As individuals, those persons were not in fact parties to the suit. In the event, and only in the event that they in their official capacities disregarded the authority and command of the Court, and were proceeded against as for a contempt, would they become liable as individuals to the operation and effect of the judgment and of the processes which the Court might employ to enforce it.

When the persons making the present motion became the officers of the city they placed themselves in the position of being bound officially by the judgment against the city, and of being obliged to obey it. As individuals they are not now parties to the writ of mandamus they seek to quash. As officers of the city they are under the same necessity to comply with the requirements of the writ as they would have been had they been named as defendants in the judgment and proceedings anterior to it.

King vs. Mayor of Fowey, 5 Dowling & Ryland, 614.

In Lindsey vs. Auditor, 3 Bush. (Ky.), 231, the Court held that an action for a mandamus against the State Auditor for refusing to issue a warrant upon the Treasurer for the payment of a demand against the State, was substantially a controversy between the plaintiff and the State; and as the Auditor had gone out of office, and his successor had qualified, the change ought to be suggested on the record, and the action proceed against the successor, who would be bound as if he had been in office at the commencement of the proceedings.

Pages 235–236.

The earlier case of Louisville vs. Kean, 18 Ben Monroe, 9, 13, had decided that an action for a mandamus against the Mayor and members of the General Council of Louisville, as well as the judgment in the action, was against them in their corporate character; that the proceeding should properly have been against the corporation, or against the General Council as the body that represented the corporation; that regarding the action as against the corporation, and not against the Mayor and members of the General Council individually, the judgment would be obligatory on the members of the General Council in office at the time of its rendi-

tion; and hence that the city might appeal from the judgment.

And the same doctrine was declared in Maddox vs. Graham, 2 Metcalfe (Ky.), 56, 71.

In Bassett vs. Barbin, 11 Louisiana An., 672, 673, it was held that a statute directing the levy of a specific tax by the Sheriff applied as well to a successor of the Sheriff in office when the statute was passed as to the incumbent at the time.

In Pegram vs. Com'rs, 65 N. Ca., 114, the Court held that the individual members of a Board of County Commissioners, who succeeded to office between the time at which a judgment awarding a writ of mandamus was rendered and the service of the writ, must obey the writ, and that they were not entitled to say they had not had a day in Court.

And see Commissioners vs. Bryson, 13 Florida, 281.

In Soutter vs. City of Madison, 15 Wisconsin, 30, 37–38, the judgment was pronounced after a portion of the Aldermen on whom the alternative writ had been served had gone out of office and others had been chosen and were in their places, but the Court held that the duty of levying taxes was perpetual upon the officers named in the writ and their successors, and that the peremptory writ might be directed to and enforced upon the Mayor and Common Council of the city generally.

The case followed the authority of People vs. Collins, 19 Wendell, 56, 68, which is substantially to the same effect.

And the case of Clark vs. McKenzie, 7 Bush. (Ky.), 523, 531, recognizes the same principle.

In State, etc., vs. Gates, 22 Wisconsin, 210, the service of the papers laying the foundation for an application for a mandamus to compel the levy of a tax was upon a person in office, and his successor appeared and moved to discharge the rule. The Court held that the proceeding was to be regarded as against the officer, and not against the individual, and when proper papers had been once

served upon the officer any proceeding which they warranted might be taken against his successor without commencing *de novo*.

The Supreme Court of the United States referred to the above case in Morgan vs. Town Clerk, 7 Wallace, 610, 613, with apparent approbation.

And see Hollister vs. Judges District Court, 8 Ohio St. R., pp. 201, 204.

The present case is clearly distinguishable from the class of cases in which executive officers are defendants to proceedings to compel by mandamus the performance of official duties. Here the cause of action is against the city, and the city is the real defendant, and is subject to the judgment of the Court, and is compellable to obey the process issued to obtain satisfaction of the judgment. The officers are parties merely as a means of enforcing obedience by the city to the judgment. In the other class there is no cause of action against the Government, State or Federal, nor is it suable. No judgment can be rendered or enforced against it. And the ground of the proceeding against the officer is that he has not performed his official duty as prescribed by law, but is guilty of a personal wrong, for which he is liable to a personal suit.

Hence, in The Secretary vs. McGarrahan, 9 Wallace, 298, 313, it was held that a proceeding for a mandamus against the Secretary of the Interior abated by his going out of office, and that the judgment could not be enforced against his successor, who was never made a party to the suit.

And so in United States vs. Boutwell, 17 Wallace, 604, upon the same principle the Court refused to permit the Secretary of the Treasury to be substituted in a proceeding for a mandamus against his predecessor in office. The Court said: "Were a demand made upon him he might discharge the duty, and render the interposition unnecessary. At all events, he is not in privity with his predecessor, much less is he his predecessor's personal representative."

The other objection is that the judgment of March, 1875, so far as it authorized the issue of the writ for the levy of the taxes for

1876, was void. In other words, as I understand the objection, the Court had no jurisdiction to divide the duty to levy and collect the taxes to pay the decree and distribute it through three years, but should have required the levy and collection of the whole in a single year.

It would be most unfortunate for corporations situated as the City of Memphis is if the position was true. That it is not true is too plain for argument. In order to maintain it the petitioners cannot rest with showing that the Circuit Court erred in directing that the levy and collection of the tax should extend through three years; but they must go further, and show that the Court had no jurisdiction to make such an order.

There certainly is no statute nor positive rule of law forbidding the Circuit Court to order taxes to be levied and collected during several years for the purpose of paying a judgment or decree. As has already been shown, there is no technical obstacle growing out of the substitution of one set of men for another as officers of a municipality which prevents the Court enforcing obedience in one year, by the officers then in office, to a judgment rendered against the corporation in a previous year when a different set of men represented it.

Such apportionment of the tax was for the benefit of the city or the tax-payers, and in no way was of advantage to Brown. It amounted to this: that the burden of the whole tax was, in the judgment of the Court, too great for the tax-payers to bear in a single year, and therefore the Court, by way of favoring them, would allow only a portion to be collected the first year, and would postpone the rest till subsequent years.

Brown was entitled to the levy of the whole the first year, and if the amount levied was not collected he was entitled to a relevy of enough to pay the balance due, without reference to the fact that the former levy had been made but had not been collected.

State vs. City of Madison, 15 Wisconsin, 30, 34–36.
Benbow vs. Iowa City, 7 Wallace, 313.

Now why, if these were Brown's rights, could the Court not

anticipate, or, rather, adapt its judgment to the existing circumstances, and provide equitably and justly for the whole case, or prescribe and regulate the remedies to be employed throughout the case?

As a mandamus operates much in the nature of a bill in Chancery for specific performance, and is to prevent disorder from a failure of justice and a defect of police, and is used only in extraordinary cases where the usual and ordinary modes of proceeding and forms of remedy are powerless to afford redress, and is dependent upon the exercise of a wise judicial discretion, it is not seen why the Circuit Court could not lawfully do just what it did. In support of its judgment it is to be presumed that a state of case appeared before the Court making it proper that the precise judgment it pronounced should be rendered. And, if that presumption is to be indulged, I submit there is nothing to require this Court to treat the judgment of the Circuit Court as erroneous, much less void.

See High's Extraordinary Legal Remedies, Secs. 1–9.

Objection is made particularly to that part of the judgment of March, 1875, which directed the Clerk to issue the writ of mandamus in pursuance of the judgment each year on the application of Brown.

In every judgment the taking out of execution is at the discretion of the plaintiff, and the order awarding the execution is practically a direction to the Clerk to issue the writ whenever the plaintiff calls for it.

Brown could not take out, nor could the Clerk issue, nor would the city or its officers be obliged to obey any writ except one which conformed to the judgment. And hence, the time of taking out the writ, if left to Brown's direction, could not be used to the detriment of the city or the tax-payers.

Besides, it seems to me that the issuance of the writs of mandamus as directed in the judgment was a mere formality. The writs added no force to the judgment, which of itself conclusively bound the city and its officers to obey it, even though no writ whatever

had been ordered or had issued.

There are grounds of the motion to quash which go to show that the Court ought not to have rendered the judgment on which the writ of mandamus issued. I take it for granted the Court will not look into them, and therefore take no notice of them.

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Of Counsel for Judge Trigg.